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No. 87-1190-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Ray C. Broce and Broce Construction Co., Inc.

Docketed:
January 12, 1988

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Schneider,Curt T., Casebeer II,Glenn E.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Jan 12 1988 | G | Petition for writ of certiorari filed. |
| 2 | Jan 12 1988 | | Appendix of petitioner US filed. |
| 3 | Feb 4 1988 | | Brief of respondents Ray C. Broce, et al. in opposition filed. |
| 4 | Feb 10 1988 | | DISTRIBUTED. February 26, 1988 |
| 5 | Feb 17 1988 | X | Reply brief of petitioner United States filed. |
| 6 | Feb 29 1988 | | Petition GRANTED. |
| | | | ********** |
| 8 | Apr 5 1988 | | Order extending time to file brief of petitioner on the merits until May 7, 1988. |
| 17 | May 6 1988 | X | Brief of petitioner United States filed. |
| 9 | May 16 1988 | | Record filed. |
| | | * | Certified copy of C. A. Proceedings received. |
| 10 | May 19 1988 | | Record filed. |
| | | * | Certified copy of original record, box, received. |
| 12 | May 31 1988 | | Order extending time to file brief of respondent on the merits until June 28, 1988. |
| 13 | Jun 24 1988 | | Brief of respondents Ray C. Broce, etc., et al. filed. |
| 14 | Jul 6 1988 | | CIRCULATED. |
| 15 | Jul 15 1988 | | Set for argument. Tuesday, October 4, 1988. (1st case) (1 hr.) |
| 16 | Jul 25 1988 | X | Reply brief of petitioner United States filed. |
| 18 | Oct 4 1988 | | ARGUED. |

87-1190

No.

SUPREME COURT, U.S.
FILED
JAN 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1987

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UNITED STATES OF AMERICA, PETITIONER

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

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## QUESTION PRESENTED

Whether a defendant who pleads guilty to two indictments alleging two different criminal conspiracies, as part of a plea bargain in which the government agrees not to prosecute him on other charges, is entitled to a factual determination of his contention, raised for the first time in a later collateral attack on his sentences, that the two conspiracies alleged were actually a single conspiracy.

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# In the Supreme Court of the United States

OCTOBER TERM, 1987

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No.

UNITED STATES OF AMERICA, PETITIONER

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

---

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINIONS BELOW

The order and judgment of the court of appeals affirming the district court's grant of relief to respondents (App. 1a-4a) is unreported. The memorandum and order of the district court granting respondents relief (App. 5a-13a) is unreported. The prior opinion of the en banc court of appeals reversing the district court's denial of relief (App. 14a-86a) is reported at 781 F.2d 792. The prior opinion of the court of appeals panel (App. 87a-111a), which was vacated on the grant of rehearing en banc, is reported at 753 F.2d 811. The original memorandum and order of the district court denying respondents relief (App. 112a-123a) is unreported.

## JURISDICTION

The judgment of the court of appeals (App. 1a-4a) was entered on August 18, 1987. A petition for rehearing and

suggestion for rehearing en banc was denied on November 13, 1987 (App. 124a-125a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

## STATEMENT

Respondent Ray C. Broce is the president of respondent Broce Construction Co., Inc. Both respondents were named as defendants in two separate indictments filed in the United States District Court for the District of Kansas. Each indictment charged, among other things, conspiracy to rig bids on a specific Kansas highway construction project in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pursuant to plea bargains, both respondents entered guilty pleas to the Sherman Act counts of both indictments, and Mr. Broce also pleaded guilty to one count of mail fraud in violation of 18 U.S.C. 1341. The district court accepted the guilty pleas. Consistent with the plea bargains, the court imposed a total fine of $1.5 million ($750,000 on each Sherman Act count) on the corporation and sentenced Mr. Broce to concurrent two-year terms of imprisonment and a total fine of $101,000. Subsequently, respondents filed a motion to vacate the sentences imposed with respect to the second indictment on the ground that the sentences imposed constituted multiple punishment for the same offense in violation of the Double Jeopardy Clause. The district court initially denied the motion, but the court of appeals reversed and remanded for a factual determination. On remand, the district court granted the motion. The court of appeals affirmed.

1. In a two-count indictment filed November 17, 1981 (App. 143a-151a), respondents were charged with one



count of violating Section 1 of the Sherman Act and one count of mail fraud in violation of 18 U.S.C. 1341. The indictment alleged that the object of the Sherman Act conspiracy was to rig bids on Kansas Federal-Aid Highway Project No. 23-60-RS-1080(9) (the Meade County project), let by the State of Kansas on April 25, 1978. The indictment charged that the conspiracy began in or about April 1978. App. 147a.

Respondents were at all times represented by retained counsel. Plea negotiations began after the government sent a letter to respondents' counsel on January 11, 1982,[1] advising him that the government would seek an additional indictment against respondents for conspiracy to rig bids on a Ford County project let by the State of Kansas on July 17, 1979. Plea negotiations proceeded, and on January 22, 1982, the government sent respondents' counsel a letter enclosing draft plea agreements, which were eventually signed and were filed with the district court on February 8, 1982 (App. 126a-132a, 133a-135a).

In those agreements, both respondents agreed to plead guilty to the indictment charging them with conspiracy to rig bids on the Meade County project, and Mr. Broce agreed to plead guilty to the mail fraud charge. Respondents also agreed to plead guilty to a second indictment, which had not yet been filed, charging them with conspiracy to rig bids on a Barton County project let by the State of Kansas on July 17, 1979.[2] Respondents acknowledged in their plea agreements that the maximum fine for *each* Sherman Act count to which each of them was agreeing to plead guilty was $100,000 for Mr. Broce (App. 127a) and $1,000,000 for the corporation (App. 134a). See 15 U.S.C. 1. Mr. Broce also acknowledged that

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[1] The date stamp actually gave the year incorrectly as 1981.

[2] Respondents were never indicted for rigging bids on the Ford County project referred to in the government's letter of January 11, 1982.

consecutive sentences could be imposed (App. 127a). In return for the guilty pleas, the government agreed, among other things, (1) not to prosecute respondents for other antitrust violations in Kansas and Oklahoma;[3] (2) to dismiss the mail fraud count against the corporation in the November 17 indictment; and (3) to recommend a total fine of $1.5 million against the corporation on the Sherman Act charges (App. 127a-128a, 134a-135a).

On February 4, 1982, as had been contemplated in the plea agreements, respondents were charged in a separate one-count indictment (App. 136a-142a) with Sherman Act conspiracy. The indictment alleged that the object of the conspiracy was to rig bids on the Barton County project, Kansas Public Highway Project No. KRL 29-2(26). The indictment charged that the conspiracy began in or about July 1979. App. 139a.

On February 8, 1982, respondents entered guilty pleas to the two Sherman Act conspiracy charges in accordance with the previously negotiated plea agreements. At the hearing conducted pursuant to Fed. R. Crim. P. 11, the district court ascertained that respondents understood that they "would be admitting all the facts alleged in these charges" (2/8/82 Tr. 11). The district court also explained that, "so far as the corporation is concerned, the maximum punishment is a fine up to one million dollars on each [Sherman Act] charge" and that, "as to you [Mr. Broce] individually, * * * the maximum punishment is a fine up to one hundred thousand dollars and a term of imprisonment up to three years on each [Sherman Act]

[3] Respondents had in fact engaged in substantial violations of the Sherman Act in Oklahoma, some of which are described in detail (drawing on Mr. Broce's immunized testimony at two trials of Oklahoma co-conspirators following his guilty plea in this case) in *United States* v. *Washita Construction Co.*, 789 F.2d 809 (10th Cir. 1986), and *United States* v. *Metropolitan Enterprises, Inc.*, 728 F.2d 444 (10th Cir. 1984).



charge" (*id.* at 11-12). Mr. Broce indicated without qualification that he understood (*ibid.*). The court questioned Mr. Broce, under oath, as to whether the government's written statement of facts in support of the pleas (App. 129a-132a) was correct. In response, Mr. Broce stated that he intended to let each bid-rigging agreement "stand on its own" and thus refused to discuss a future job in Grey County at the time the Meade County job was rigged (2/8/82 Tr. 18). He also stated, with one other qualification not relevant here, that the government's statement of facts was correct (*id.* at 18-19). Defense counsel stated that he saw no reason "why the Court should not accept these pleas of guilty" (*id.* at 21). The court did accept the pleas.

Before sentencing, the government prepared and provided to defense counsel an "Official Version of the Offense" for inclusion in the presentence report. That document discussed a large conspiracy in Kansas in which respondents and others had participated before 1973 but stated that, "in about 1973, this conspiracy ended" (Official Version 1). It also stated that there were "two *separate* conspiracies giving rise to the Indictments" (*ibid.* (emphasis added)).

Sentencing occurred on March 15, 1982. Defense counsel was given an opportunity to state "any dispute with what the government has included in the pre-sentence report about the official version of the offense" (3/15/82 Tr. 6). Defense counsel expressed some disagreements with the Official Version but did not dispute the explicit statement in the Official Version that there were two separate conspiracies (*id.* at 6-7). The court asked whether there was "any legal reason * * * why sentence should not be pronounced," and defense counsel responded: "None known to the defendant, Your Honor" (*id.* at 8). The court then imposed on the corporation the fines that the government had agreed to recommend. The court also

sentenced Mr. Broce to two years' imprisonment and to fines of $50,000 on each Sherman Act count and $1000 on the mail fraud count. *Id.* at 10-11.[4] The government dismissed the mail fraud count against the corporation (*id.* at 12).

Respondents did not appeal. Nor did they, at any time before sentencing, claim that the two indictments in fact alleged the same conspiracy.

2. More than a year after the entry of their guilty pleas, respondents filed a motion pursuant to Fed. R. Crim. P. 35(a) to vacate their sentences on the charges contained in the second indictment. Relying on the intervening decision in *United States* v. *Beachner Construction Co.*, 555 F. Supp. 1273 (D. Kan. 1983), aff'd, 729 F.2d 1278 (10th Cir. 1984), respondents argued that there had been only a single conspiracy to rig bids in Kansas.[5] Respondents therefore contended that they were guilty of only one Sherman Act offense and that it violated the Double Jeopardy Clause to impose fines on both Sherman Act counts to which they had pleaded guilty.

[4] Mr. Broce has paid his $101,000 fine and served his prison term. The corporation has paid $750,000 of the $1,500,000 in total fines assessed on the two Sherman Act counts.

[5] The defendants in *Beachner* alleged that the large conspiracy discussed in the Official Version of the Offense in the present case—*i.e.*, a large, continuing conspiracy to rig bids on any and all Kansas highway jobs—did not (as the government contended) end in 1973, when the major organizer of the conspiracy went out of business. The defendants argued that the post-1973 bid-rigging agreements with which they were charged were merely part of the same large, continuing conspiracy. The district court agreed with the defendants and rejected the government's argument that, after 1973, each new bid-letting gave rise to an opportunity to form a new conspiratorial agreement. The government appealed, but the court of appeals held that the question was one of fact and that the district court's finding was not clearly erroneous.



The government argued that respondents' failure to raise their double jeopardy defense before judgment and sentence precluded them from doing so on collateral attack. The government also argued that respondents could not attack the factual and theoretical foundations of the indictments to which they had pleaded guilty. The government stipulated, however, that if the court reached the merits of the one-conspiracy-or-two issue it could " 'consider the record made in the evidentiary hearing' " held in the *Beachner* case (see App. 63a).

Relying on *Kerrigan* v. *United States*, 644 F.2d 47 (1st Cir. 1981), the district court held that a defendant asserting a double jeopardy claim may not contest the factual and theoretical foundations of the indictment to which he entered a guilty plea. In this case, the court noted that each indictment, on its face, charged a separate conspiracy. The court held that respondents had admitted their participation in separate conspiracies and therefore could not raise a double jeopardy claim that depended on the nonexistence of separate conspiracies. App. 112a-123a.

3. A divided panel of the court of appeals reversed (App. 87a-111a), but the court granted rehearing en banc. The en banc court also reversed by a divided vote (App. 14a-86a). Relying on *Menna* v. *New York*, 423 U.S. 61 (1975), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), the majority held that the Double Jeopardy Clause "stands as an inhibition upon the government's right to institute charges" that is "absolute" and not "subject to waiver" (App. 18a). The majority added that "the defendants' plea bargain cannot work an estoppel of their right to assert the invalidity of the charge" (App. 20a). The majority rejected the government's argument that "the defendants' pleas of guilty must be considered admissions of all the facts alleged in the indictments," asserting that the indictments

"did not specifically allege separate conspiracies" and reasoning that "the admissions of factual guilt subsumed in the pleas of guilty go only to the acts constituting the conspiracy and not to whether one or more conspiracies existed" (App. 21a). The majority recognized that its decision was at odds with "many cases which have held to the contrary" (*ibid.*).

Having decided that the district court erred by holding respondents to their admissions that two conspiracies existed, the court of appeals next addressed the issue whether two conspiracies did in fact exist. Although the majority suggested that on their faces the indictments did not charge more than one conspiracy, it ultimately concluded that "the question of whether the indictments charged one or two conspiracies is, in the context of this case, wholly factual" (App. 23a). Because the district court had not addressed that factual issue in its opinion, the court remanded the case "for a factual determination" (App. 24a).

Judge McKay joined the majority opinion, including the order remanding to the district court, but he expressed reluctance because he believed that as a matter of law the second indictment charged the same conspiracy as the first indictment (App. 25a). Judge Seymour agreed with the majority's holding that respondents could raise their double jeopardy claim on collateral attack, but not with its underlying reasoning that the Double Jeopardy Clause is "an 'absolute inhibition' upon government" (App. 28a). She also disagreed with the majority's decision to remand the case, arguing that "the *Beachner* findings should * * * be accorded full preclusive effect in the proceeding" (App. 39a).

Judges Barrett and Doyle filed separate dissenting opinions. Judge Barrett distinguished *Menna* and *Blackledge* on the ground that no factual hearing was required to



resolve the double jeopardy and due process issues in those cases (App. 50a-51a). Judge Barrett argued "that an accused waives his claim of double jeopardy to a subsequent criminal charge if the crimes charged, on their faces, are separate and distinct and if the evidence necessary to establish guilt as to one charge differs from that necessary to establish guilt as to another" (App. 51a (emphasis omitted)). Judge Barrett stated that each indictment, on its face, charged a separate conspiracy (App. 56a, 64a). Similarly, Judge Doyle concluded that *Menna* and *Blackledge* are distinguishable, and that the defendants had waived their double jeopardy argument in this case (App. 69a-86a).[6]

4. On remand, the district court followed the approach taken in *Beachner* and found as a matter of fact that "the two indictments returned against these defendants charge simply different aspects of the same conspiracy to restrain competition" (App. 13a). The court vacated the judgment and sentence entered on the second indictment (*ibid.*).

The government appealed, both renewing the argument that respondents were precluded from raising their double jeopardy claim in the circumstances of this case and arguing that the district court had committed reversible error in finding that there was only one conspiracy. While the appeal was pending, this Court decided *Ricketts* v. *Adamson*, No. 86-6 (June 22, 1987), holding that the defendant in that case had waived his double jeopardy rights through the terms of his plea agreement.

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[6] It is the 1986 decision of the en banc court of appeals, as partially reaffirmed by the 1987 panel decision, that we principally challenge in this petition. We did not seek review of the en banc decision at the time it was rendered because of our general position that review by this Court in criminal cases should await final disposition by the trial court. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 224 n.71 (6th ed. 1986).

The court of appeals, once again divided, affirmed in a short order and judgment (App. 1a-4a). The court wrote (App. 2a):

> Although *Ricketts* invalidates the broader rationale underlying the plurality opinion [*sic*] in *Broce*, that the double jeopardy prohibition "does not constitute an individual right which is subject to waiver," 781 F.2d at 795, it does not affect its narrower holding, based on clear Supreme Court precedent, that a guilty plea does not itself constitute a waiver of double jeopardy protection. *Id.* at 796-97; *see also Menna* v. *New York*, 423 U.S. 61, 62-63 & n.2 (1975) (guilty plea is merely an admission of factual guilt, which does not bar a claim that the state may not constitutionally prosecute the defendant no matter how validly his factual guilt is established); *Blackledge* v. *Perry*, 417 U.S. 21, 29-31 (1974).

The court also rejected the government's argument that there were in fact two conspiracies (App. 2a-3a). Judge Barrett dissented (App. 4a). Rehearing was denied, Judge Barrett again dissenting, and rehearing en banc was denied (App. 124a-125a).

## REASONS FOR GRANTING THE PETITION

In *Menna* v. *New York, supra*, a case arising under the Double Jeopardy Clause, this Court was careful to state the limitations of its holding: "We simply hold that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute" (423 U.S. at 63 n.2). Earlier, in *Blackledge* v. *Perry, supra*, this Court had reached the same conclusion in a case arising under the Due Process Clause. The Court in *Blackledge* held that a plea of guilty to a felony indictment, returned following the defendant's demand of a trial de novo on a misdemeanor charge based



on the same conduct as the later felony charge, did not foreclose a contention that the bringing of the greater charge amounted to vindictive prosecution as a matter of law. In neither case was the guilty plea a result of plea bargaining in which the government made concessions to the defendant in exchange for his guilty plea. And in neither case did the constitutional challenge depend on establishing facts contrary to the allegations contained in the indictment to which the defendant had pleaded guilty.

The question presented by this case is whether *Menna* and *Blackledge* should be extended in two ways. First, should a defendant, notwithstanding *Menna*'s explicit limitation to cases in which the invalidity of the charge can be "judged on its face," be allowed long after his guilty plea to go behind the allegations of the indictment and obtain a factual determination, contrary to the allegations in the indictment, that two facially distinct crimes are in fact the same offense? Second, should a defendant who—like respondents but unlike the defendants in *Menna* and *Blackledge*—negotiates a guilty plea and secures an agreement from the government, in exchange for that plea, not to prosecute other charges be allowed later to use the Double Jeopardy Clause to free himself from some of his half of the bargain? The court of appeals answered both questions in the affirmative.

Whether *Menna* and *Blackledge* should be extended in one or both of these ways is a question that has arisen frequently in the courts of appeals; indeed, a majority of the regional courts of appeals have now had occasion to address the question. Compare *Kerrigan* v. *United States*, 644 F.2d 47 (1st Cir. 1981) (holding defendant to his plea bargain), and *Brown* v. *Maryland*, 618 F.2d 1057 (4th Cir.) (same), cert. denied, 449 U.S. 878 (1980), and *United States* v. *Pratt*, 657 F.2d 218 (8th Cir. 1981) (same), and *United States* v. *Allen*, 724 F.2d 1556 (11th Cir. 1984) (same), with *United States* v. *Atkins*, No. 86-1610 (5th

Cir. Dec. 8, 1987) (allowing defendant, despite plea bargain, to make double jeopardy argument), and *United States* v. *Baugh*, 787 F.2d 1131 (7th Cir. 1986) (same), and *Launius* v. *United States*, 575 F.2d 770, 772 (9th Cir. 1978) (same). See also *United States* v. *Blocker*, 802 F.2d 1102, 1103-1104 (9th Cir. 1986) (allowing double jeopardy challenge without indicating whether plea resulted from plea bargaining); *United States* v. *Broussard*, 645 F.2d 504, 505 (5th Cir. 1981) (same).

The decision below is in square conflict with the decisions of at least four courts of appeals. In addition, the court below went beyond all prior decisions in this area. Before this case, no court of appeals had ever required a trial court to conduct a factual inquiry into whether two facially distinct crimes to which a defendant has pleaded guilty were in fact the same offense. The court of appeals did so in this case even though the defendants had admitted that two conspiracies existed. For these reasons, and because the decision below is incorrect, review by this Court is warranted.[7]

1. a. The en banc court of appeals correctly noted that its decision was contrary to "many cases" (App. 21a). In particular, the decision below conflicts directly with *Kerrigan* v. *United States, supra; Brown* v. *Maryland, supra; United States* v. *Pratt, supra*; and *United States* v. *Allen, supra.*

In *Kerrigan*, the defendant was charged with two conspiracies in two indictments (644 F.2d at 47-48). He entered into a plea bargain in which he agreed to plead

[7] We also strongly disagree with the holdings below, which are based on *United States* v. *Beachner Construction Co., supra*, that the two conspiracies charged in the two indictments were in fact the same conspiracy. See, *e.g., In re Grand Jury Proceedings*, 797 F.2d 1377, 1384 (6th Cir. 1986) (criticizing approach used in *Beachner* to find only one conspiracy), cert. denied, No. 86-663 (Jan. 12, 1987). We do not believe, however, that that fact-bound issue warrants this Court's review.



guilty to both conspiracy charges and the government agreed to dismiss one other count and to make certain recommendations concerning sentence. His pleas were accepted, and he was sentenced to three years' imprisonment for one conspiracy and a consecutive two-year term for the other. *Id.* at 48. On collateral attack (see *id.* at 47), Kerrigan argued "that there was in fact only one conspiracy" (*id.* at 48). The First Circuit rejected Kerrigan's argument that *Menna* required an evaluation of his double jeopardy claim on the merits, observing that *Menna* does not hold "that a defendant who pleaded guilty may later contest the factual and theoretical foundations of the indictment to which he pleaded, so as to show that, in fact, he committed only a single offense" (*id.* at 49). And the court refused to consider Kerrigan's argument that there was in fact only one conspiracy, holding that "Kerrigan's claim of double jeopardy must be evaluated under the version of facts stated in the indictment, not against an alternative version of events which Kerrigan now claims is more accurate" (*ibid.*).

*Kerrigan* is virtually identical to the present case, and its reasoning plainly would have required rejection of respondents' motion to vacate their sentences; indeed, *Kerrigan* was the basis of the district court's original decision denying respondents relief. The court of appeals dismissed *Kerrigan* as unpersuasive (App. 20a), but it also endeavored to distinguish the case on two grounds.[8] Neither will work. First, the court stated that the portion of *Kerrigan* on which the government relied was dictum because the *district court* in that case had not ruled on "the question of waiver" (App. 20a n.4). But the holding of a

[8] The court of appeals also said, apparently in an effort to distinguish *Kerrigan*, that "the admissions of factual guilt subsumed in the pleas of guilty go only to the acts constituting the conspiracy and not to whether one or more conspiracies existed" (App. 21a). But that statement simply contradicts *Kerrigan*; it does not distinguish the case.

case is the basis that the rendering court gives for its decision, not the basis that a lower court gave for reaching the same result. And the holding of *Kerrigan* is that a defendant who has pleaded guilty to two conspiracies has no right to argue on collateral attack that there was only one conspiracy, except, perhaps, when the indictments on their faces show that there was only one conspiracy. Second, the court below stated that in this case, unlike *Kerrigan*, "the * * * indictments did not specifically allege separate conspiracies" (App. 21a). That is simply not so. Each indictment in this case alleged the existence of a conspiracy whose object was to rig bids on a particular construction project, and each indictment alleged a different beginning date for the conspiracy. If those allegations were true, there were two conspiracies. See *Kotteakos* v. *United States*, 328 U.S. 750, 769 (1946) (distinguishing "the common purpose of a single enterprise" from "the several, though similar, purposes of numerous separate adventures of like character"). As the *Kerrigan* court said, "indictments charging two or more agreements, even agreements to commit similar or related crimes, charge more than one conspiracy" (644 F.2d at 49).

In *Brown*, the defendant was charged, on a felony murder theory, with first-degree murder punishable only by death or life imprisonment. He entered into a plea bargain with the State and pleaded guilty to second-degree murder and attempted armed robbery. He received consecutive sentences of 25 and 10 years. On collateral attack, he argued that, because the original murder charge had been based on a felony murder theory, the underlying felony—armed robbery—was a lesser included offense, and he could not be sentenced for both second-degree murder and armed robbery. 618 F.2d at 1058. The Fourth Circuit did not resolve that question on the merits because it held that "Brown's voluntary and intelligent guilty plea waived his right to object to his convictions on double



jeopardy grounds" (*id.* at 1059). If the result in *Brown* is correct, then *a fortiori* the decision below is wrong.[9]

In *Pratt*, the defendant was charged with six offenses. As part of a negotiated plea bargain, he pleaded guilty to two counts, each of which alleged a substantive narcotics offense occurring on the same day, and the government moved to dismiss the remaining four counts. 657 F.2d at 219. The district court, like the district court in this case, ascertained that the defendant understood that he could receive cumulative punishments for the offenses to which he had pleaded guilty (*id.* at 219-220), and it then imposed two consecutive five-year sentences (*id.* at 220). On collateral attack (see *id.* at 218), the defendant "urge[d] that in fact he had been punished twice for what was really only one offense" (*id.* at 220). The Eighth Circuit refused to consider that claim, observing that Pratt "pleaded guilty, presumably, because he preferred the certainty of a maximum of ten years to the risk of conviction and punishment on each of six counts." The court then considered and rejected the argument "that *Menna* * * * requires us to reach the merits of Pratt's double-jeopardy argument." *Ibid.* The court observed (*id.* at 221):

> Menna's claim was wholly unrelated to the facts, whereas the whole question raised by Pratt is intertwined with the issue of exactly what it was that he and the DEA agent agreed to buy and sell—two items, or only one. Menna's case was not complicated by the presence of additional charges which the state agreed to dismiss. And Menna did not explicitly and voluntarily expose himself to the very event (here, consecutive terms of imprisonment) that he later

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[9] The *Brown* court did not discuss *Menna* or *Blackledge*, but those cases are distinguishable from *Brown* because the guilty pleas in those cases were not entered pursuant to plea bargains. This Court denied certiorari in *Brown*.

> claimed was a violation of the Double Jeopardy Clause. Pratt, by contrast, never made a double-jeopardy argument until months after his sentence. He was aware of all the facts later asserted in support of that argument. He had no right to be surprised at the sentence that was imposed. He received the benefit of his bargain, dismissal of the other four counts.

In all of these respects, *Pratt* is on all fours with the present case. The "whole question raised by" respondents is "the issue of exactly what it was that" they and their co-conspirators agreed to do—to rig bids on two particular occasions through agreements " 'stand[ing] on [their] own' " (see p. 5, *supra*) or, instead, to rig bids on all available occasions. There were "additional charges" (both pending and contemplated) in this case "which the [United States] agreed to dismiss" and not to bring. Respondents "explicitly and voluntarily exposed [themselves] to the very event" (here, cumulative fines) "that [they] later claimed was a violation of the Double Jeopardy Clause." Respondents "never made a double-jeopardy argument until months after [their] sentence[s]." Respondents were "aware of all the facts later asserted in support of that argument."[10] Respondents "had no right to be surprised at the sentence[s] that were imposed," for the corporation received precisely the sentence that the United States and respondents had agreed the government would recommend, and Mr. Broce explicitly acknowledged that the range of permissible punishments in his case included fines of up to $100,000 and imprisonment for up to three years on each Sherman Act count—much more than the $101,000 *total* fine and two-year term of imprisonment

[10] Of course, respondents did not have the *Beachner* record or the *Beachner* decision in their possession at the time of their pleas and sentencing, for the hearing in *Beachner* came later. But there is no good reason why, if respondents wanted to litigate this issue, they could not have done so precisely as the *Beachner* defendants later did.



that he in fact received. And respondents "received the benefit of [their] bargain[s]," including dismissal of the mail fraud count against the corporation and a promise not to prosecute respondents for other claims committed in both Kansas and Oklahoma. Yet the court below reached the opposite result from the Eighth Circuit. The conflict between the Eighth and Tenth Circuits (and the error of the latter's contention that its result is compelled by *Menna*) could not be clearer.

In *Allen*, the defendant was charged with 17 offenses. As part of a negotiated plea bargain, he pleaded guilty to four counts, one of which (Count 6) was for transporting a stolen Ferrari in interstate commerce and one of which (Count 14) was for transporting a stolen Porsche in interstate commerce. The remaining 13 counts were dismissed. As in the present case, the defendant acknowledged that he could receive cumulative punishments on all counts to which he pleaded guilty. The district court imposed consecutive five-year sentences on Counts 6 and 14 (as well as one consecutive and one concurrent sentence on the other two counts). 724 F.2d at 1557. On collateral attack (see *ibid.*), the defendant argued that "the Ferrari and Porsche were transported as part of a single shipment and therefore Counts 6 and 14 constituted a single offense for which he could receive only a single sentence under the double jeopardy clause" (*id.* at 1558). The Eleventh Circuit refused to consider that claim, explicitly adopting the Eighth Circuit's analysis in *Pratt*. The court observed: "[Allen] has received the benefit of the dismissal of the other 13 charges and now wishes to renege on his part of the bargain. This we will not permit." *Ibid.* Once again, there can be no doubt that the court's reasoning would have required a different result than the one the court of appeals reached in the present case. Respondents received the benefit of their bargains and would not, in the Eleventh Circuit, be allowed to renege on their parts of the bargains.

Thus, the precedent of at least four circuits stands solidly against the result reached in this case. See also *United States* v. *Herzog*, 644 F.2d 713, 716 (8th Cir.), cert. denied, 451 U.S. 1018 (1981); *United States* v. *Solomon*, 726 F.2d 677, 678 n.2 (11th Cir. 1984); *United States* v. *Griffin*, 765 F.2d 677, 680-682 (7th Cir. 1985); cf. *United States* v. *Sheehy*, 541 F.2d 123, 130 & n.20 (1st Cir. 1976) (defendant may not raise multiplicity argument for the first time on appeal); *United States* v. *Perez*, 565 F.2d 1227, 1232 (2d Cir. 1977) (double jeopardy argument waived if not asserted before trial); *United States* v. *Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984) (same), cert. denied, 472 U.S. 1017 (1985). The conflict between the decision below and the decisions of other courts of appeals on this frequently recurring issue warrants this Court's attention.

b. Insofar as the decision below holds that a defendant may raise double jeopardy claims on appeal or collateral attack despite a prior counseled, negotiated guilty plea, the decision does find some support in the decisions of three other circuits. *United States* v. *Atkins, supra; United States* v. *Baugh, supra; Launius* v. *United States, supra*; see also *United States* v. *Blocker, supra; United States* v. *Broussard, supra*. But the decision below does more than that: it also allows the defendants to obtain a factual determination that the allegations in the indictments—specifically, the allegations that the conspiracies began on two separate dates and had two different objects (and were thus distinct)—were not true, even though they have previously admitted those facts.[11] The court held that "the

[11] Respondents' admissions were not limited to those that were inherent in the guilty pleas themselves, *i.e.*, admissions of the facts alleged in the indictments. Respondents were given explicit, on-the-record opportunities to express any disagreement with the government's version of the offenses, which included an express reference to the separate conspiracies giving rise to the indictments. With a few exceptions that are not pertinent here, respondents expressed agreement with that version (see p. 5, *supra*).



question of whether the indictments charged one or two conspiracies is, in the context of this case, wholly factual" (App. 23a), and it remanded "for a factual determination" (App. 24a).[12]

[12] Two of the seven judges of the en banc court suggested that the two indictments in this case could, without the need for *any* findings of fact by the district court, be deemed to charge only a single conspiracy. The majority, however, did not take this route. Furthermore, it would have been manifest error for the court to hold, without any findings of fact, that the two charged conspiracies were the same. Judge McKay's theory was that—without regard to the factual findings in *Beachner* and without the need for factual findings in this case—these two indictments on their face alleged the same conspiracy. But the scope of any conspiracy is the scope of the unlawful agreement. See *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975); *Braverman* v. *United States*, 317 U.S. 49, 52-53 (1942). And these two indictments alleged that there were two different ageements: an agreement beginning in April 1978, to rig bids on the Meade County project, and an agreement, beginning in July 1979, to rig bids on the Barton County project. Only if those factual averments were untrue—and there was but a single agreement beginning sometime earlier—did these two indictments allege the same conspiracy.

Judge Seymour's theory was that the findings of fact in *Beachner* collaterally estopped the government from relitigating the question whether there had been a single conspiracy to rig bids on highway projects throughout the 1970s. But respondents were not parties in *Beachner*. Judge Seymour's theory is therefore one of nonmutual collateral estoppel against the government—a theory that this Court unanimously rejected in *Standefer* v. *United States*, 447 U.S. 10 (1980). Indeed, there is considerable irony in Judge Seymour's approach. She would allow respondents to use *Beachner*, a case in which respondents were not parties, to estop the government from arguing that there were two separate conspiracies in this case. Yet she apparently would not allow the government to use respondents' admission in *this case*, which came long before *Beachner*, to estop them from arguing that there were *not* two separate conspiracies.

That factual determination is precisely what the First Circuit in *Kerrigan* held that defendant could not obtain (644 F.2d at 49). See also *United States* v. *Pratt, supra; United States* v. *Allen, supra*. Moreover, before this case, no court had to our knowledge held that a defendant could obtain such a determination. In *Menna*, this Court carefully limited its holding to the situation in which the validity of the double jeopardy claim could be "judged on [the] face" of the indictment (423 U.S. at 63 n.2). And, in the prior court of appeals cases extending *Menna* to cover defendants who have pleaded guilty in exchange for prosecutorial concessions, the courts had resolved the double jeopardy claims without contradicting the indictment or requiring findings of fact. See *Launius*, 575 F.2d at 771 ("[i]t appeared on the face of the indictment that but one agreement was involved and hence but one conspiracy"); *Broussard*, 645 F.2d at 505 (rejecting double jeopardy claim without requiring factfinding); see also *Blocker*, 802 F.2d at 1104-1105 (same); *Baugh*, 787 F.2d at 1132 ("This court need not transcend the four corners of the information in this case in order to assess the validity of Baugh's claim.").

In this case, however, and in one subsequent decision (*United States* v. *Atkins, supra*), courts of appeals have required district courts, on collateral attack, to conduct hearings in order to resolve factual disputes that the defendants could have raised, but did not raise, before entering their pleas of guilty. According to these decisions, the Constitution requires that result. If these decisions are followed, they portend a nightmare for the federal courts as well as for state and federal prosecutors. Any incarcerated defendant who as a result of a guilty plea has received consecutive sentences for two similar crimes, and any defendant who as a result of a guilty plea has been assessed cumulative fines for two similar crimes, would have an absolute right to require a factual hearing to determine whether those crimes are actually distinct. That will be true notwithstanding the defendant's failure to raise this factual issue at any time before pleading guilty. It will be true no matter how much time has passed since conviction. As the requirement of a factual hearing is asserted to be of federal constitutional origin, this claim will be cognizable in habeas corpus actions brought by state prisoners as well as on collateral attack by convicted federal defendants. And, according to the court below (but not the Fifth Circuit in *Atkins*), the defendant's right to obtain a factual determination of his double jeopardy claim includes the right to contradict facts he admitted in his plea-taking or sentencing hearing.[13]



Thus, the decision below, in addition to conflicting with the decisions of other circuits, is literally unprecedented and has far-reaching implications. Review by this Court is warranted.

2. The decision below is incorrect for two separate reasons. First, respondents' claim of double jeopardy—unlike the constitutional claims presented in *Menna* and *Blackledge*—depends on factual assertions inconsistent with the facts set forth in the indictments. A counseled plea of guilty, however, is an admission of the material facts set forth in the indictment. To the extent that the double jeopardy claim depends on contrary facts, the guilty plea "*quite validly* removes the issue of [double jeopardy] from the case" (paraphrasing *Menna*, 423 U.S. at 62 n.2). Second, this case is unlike *Menna* and *Blackledge* in that it involves more than a mere guilty plea: it involves a plea agreement. Respondents' agreement to

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[13] The *Atkins* court limited its holding in a way that would have required a denial of relief to respondents in the present case: "A petitioner who later contests his sentence on double jeopardy grounds after entering a guilty plea * * * has lost his right to challenge or dispute either the information in the indictment or any other facts he admitted when his guilty plea was taken." Slip op. 958.

plead guilty to two counts, in exchange for the government's promise not to bring other charges, was a valid and binding agreement that "removed the double jeopardy bar" (*Ricketts* v. *Adamson*, slip op. 6).

a. The indictments charged two different conspiracies, beginning on different dates, to rig bids on two different projects. There is no question of double jeopardy in this case unless those allegations are factually wrong. But respondents admitted the allegations by pleading guilty, and they had absolutely no right—constitutional or otherwise—later to litigate factual questions that were resolved by their pleas.

It is well established that an unconditional plea of guilty is an admission of all the elements and material facts of the formal criminal charge maintained in the indictment. *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969); see also *Menna*, 423 U.S. at 62-63 n.2 (guilty plea admits "factual guilt"). As such, the guilty plea "is itself a conviction. Like a verdict of the jury it is conclusive." *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927); see also *Mabry* v. *Johnson*, 467 U.S. 504, 508 (1984). Respondents knew that they were making factual admissions: the district court admonished them at the plea-taking hearing that by pleading guilty they would be admitting all of the facts alleged in the indictments. And, as we have already noted, respondents were given further opportunities to dispute the government's version of their offenses, including its explicit statement that there were two separate conspiracies, yet they did not take those opportunities. Indeed, Mr. Broce even volunteered while under oath—in direct contradiction to the theory later adopted in *Beachner*—that he intended each bid-rigging agreement to "stand on its own" (2/8/82 Tr. 18).

The Double Jeopardy Clause does not entitle a defendant to mount a collateral attack on the factual determination, made by his own admission via a guilty plea, that he



entered into two conspiratorial agreements rather than one. The double jeopardy issue is in this respect like the issue of factual guilt: a defendant has a constitutional right not to be punished unless he is guilty of crime, but his counseled plea of guilty "*quite validly* removes the issue of factual guilt from the case" (*Menna*, 423 U.S. at 62 n.2).[14] Nor is there any justification for construing the indictments in this case as anything other than an allegation that two conspiracies existed: one, starting in April 1978, to rig bids on the Meade County project, and one, starting in July 1979, to rig bids on the Barton County project.

It is true that the prosecution (together with the grand jury), not the defense, determines what facts will be alleged in an indictment. But a defendant who thinks that the government's version of the facts is either inaccurate or incomplete can litigate disputed facts by obtaining a pretrial hearing or by going to trial.[15] Unconditional guilty

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[14] The court of appeals cited *Launius* v. *United States*, *supra*, for the proposition that the factual admissions "subsumed in the pleas of guilty go *only* to the acts constituting the conspiracy and not to whether one or more conspiracies existed" (App. 21a (emphasis added)). There is, however, nothing in *Launius* that supports that proposition.

[15] Because it is not the role of an indictment to negate all possible defenses (*United States* v. *Sisson*, 399 U.S. 267, 288 (1970)), it will, of course, often be the case that the factual allegations in an indictment will be incomplete in the sense that, although they do not themselves *show* a violation of the Double Jeopardy Clause, they also are not sufficient to *disprove* the double jeopardy defense. A defendant who does not plead guilty may then attempt to establish a valid double jeopardy defense, in pretrial proceedings or at trial, either by proving that the allegations of the indictment are untrue or by proving other facts that are neither alleged in nor contradicted by the indictment. But a defendant who chooses to plead guilty rather than make such a factual showing forfeits his right to make that showing. In any event, in *this* case no showing sufficient to support a double jeopardy defense could have been made without contradicting the factual allegations of the indictments.

pleas, whether negotiated or otherwise, are for defendants who choose not to litigate issues of fact, and there is no reason why they should not be held to that choice.[16]

b. Respondents entered into a plea agreement under which the United States agreed not to prosecute them on other charges in return for their pleas of guilty to two conspiracy charges. The plea agreement was a valid contract. Having entered into it and received the benefit of it, respondents should not have been allowed to repudiate their half of the bargain.

"[T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott*, 437 U.S. 82, 99 (1978).[17] Just last Term,

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[16] *Menna* and *Blackledge*, which hold that in certain circumstances a guilty plea does not waive legal rights, are distinguishable from this case in two different respects. First, it is not necessary to find a "waiver" in this case in order to hold respondents to their guilty pleas: our contention is not that the plea of guilty to an indictment alleging facts constituting two crimes "waives" the double jeopardy bar—any more than a guilty plea "waives" the right not to be punished for a crime one has not in fact committed. Rather, our contention is that the guilty pleas here resolved the factual issue in a way that removed any double jeopardy issue from the case. Second, in both *Menna* and *Blackledge* the defendant faced only a single charge and contended that his plea of guilty to that charge was invalid because, in light of an earlier conviction, the prosecutor had no power to "hale him into court" on that charge in the first place, and thus had no power to enforce the defendant's plea of guilty to a charge that he should never have faced. Here, however, there is no doubt that the United States had the right to prosecute respondents for Sherman Act conspiracy at the time it did so prosecute them; the only doubt is whether it had the right to "hale them into court" on one count or two. And respondents' *simultaneous* pleas of guilty to both counts answer that question in a way that the guilty pleas in *Menna* and *Blackledge* did not.

[17] This statement from *Scott* encapsulates the underlying principle of numerous cases in which this Court has held that, when it is the defendant's own actions that lead to more than one prosecution for a



this Court applied that principle to the case of a defendant who—like respondents—sought to invoke the Clause as a means to escape from the terms of his plea agreement. In *Ricketts* v. *Adamson, supra*, this Court held that the defendant could be convicted of first-degree murder even after his prior guilty plea to a lesser included offense, because *he had agreed* that if he failed to give certain promised testimony the original first-degree murder charge would be automatically reinstated (slip op. 7). *Adamson* thus squarely holds that a defendant may validly agree to a bargain that includes the possibility of a second prosecution for the same offense. If he chooses to take actions that subject him to a second prosecution, the "Double Jeopardy Clause does not relieve him from the consequences of that choice" (slip op. 9).

Like the defendant in *Adamson*, respondents in this case made a voluntary choice. Rather than risk prosecution on all of their bid-rigging activities in Kansas and

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single charge, the Double Jeopardy Clause does not forbid that result. See, *e.g.*, *United States* v. *Ball*, 163 U.S. 662, 671-672 (1896); *United States* v. *Tateo*, 377 U.S. 463, 465 (1964); *United States* v. *Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion); *United States* v. *Dinitz*, 424 U.S. 600, 608 (1976); *Lee* v. *United States*, 432 U.S. 23, 33 (1977); *Scott*, 437 U.S. at 93; *Sanabria* v. *United States*, 437 U.S. 54, 63 n.15 (1978). For example, multiple prosecutions growing out of the same offense are permissible when the second proceeding was prompted or made necessary by the defendant's voluntary actions. Thus, "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." *Jeffers* v. *United States*, 432 U.S. 137, 152 (1977) (plurality opinion). And the Court has held that a defendant's guilty plea to a lesser included offense does not bar trial on the greater offense charged along with it, if it was the defendant's effort that led to "separate disposition of counts in the same indictment." *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984). See also *Garrett* v. *United States*, 471 U.S. 773, 798 (1985) (O'Connor, J., concurring).

Oklahoma, they agreed to plead guilty to specific charges in exchange for the government's agreement not to prosecute them further (and other government concessions). Now that respondents have received those benefits, they would like to "use the Double Jeopardy Clause as a sword" (*Ohio* v. *Johnson*, 467 U.S. at 502) and avoid their obligations under the plea agreement. But if the government may, as in *Adamson*, prosecute a defendant on the original charges following the defendant's breach of a plea agreement, then the government should also be permitted to hold the defendant to the plea agreement in the first place without regard to the obstacles the Double Jeopardy Clause might impose in the absence of the plea agreement.

As in *Adamson*, the agreements into which respondents entered in this case were valid and enforceable bargains. The only basis on which respondents seek to escape from those bargains is the one the Court rejected in *Adamson*: that the multiple prosecutions (and, in this case, sentences) to which they have been subjected, although expressly contemplated in the agreements, are nevertheless barred by the policy of the Double Jeopardy Clause itself. That policy, however, is no reason why a counseled defendant who agrees to plead to a facially valid indictment should not be held to his bargain, particularly one from which he has received substantial benefits.[18] "The parties could

[18] Respondents have permanently obtained the benefit of their bargain here. The events of the last six years effectively preclude the United States from prosecuting respondents in response to their refusal to pay the full fines imposed pursuant to the plea agreement. Mr. Broce testified under a grant of immunity at several Oklahoma trials. Moreover, the passage of time, even if the statute of limitations has not yet expired, makes an Oklahoma prosecution a most unattractive and perhaps impossible alternative. Indeed, as a general matter it is a predictable consequence of allowing defendants to raise constitutional claims for the first time on collateral attack, after earlier guilty pleas, that the government will no longer be in a position to go forward with a full prosecution of the charges dismissed in reliance on the



have struck a different bargain, but permitting the [United States] to enforce the agreement the parties actually made does not violate the Double Jeopardy Clause" (*Adamson*, slip op. 10).[19]

Indeed, this Court has long recognized that plea agreements "are consistent with the requirements of voluntariness and intelligence—because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange." *Mabry* v. *Johnson*, 467 U.S. at 508. When both the prosecution and the defense make concessions to secure a plea bargain that each perceives provides substantial benefits, a court should respect the bargain. The question whether the government could otherwise have prosecuted the defendants on each of two counts is properly treated as foreclosed by the parties' agreement.[20]

plea agreement. See, *e.g.*, *United States* v. *Griffin*, 765 F.2d 677, 681-682 (7th Cir. 1985); Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1257 (1977); see also *Kuhlmann* v. *Wilson*, No. 84-1479 (June 26, 1986), slip op. 16 (opinion of Powell, J.).

[19] We recognize, of course, that *Adamson* did not involve the prohibition embodied in the Double Jeopardy Clause against multiple punishments for the same offense. But the acceptance of the possibility that the sentencing court would impose multiple punishments for the two conspiracy charges in this case was part and parcel of the bargain that respondents struck with the government, in return for the nonprosecution of charges that carried with them the potential for substantial additional punishment. Respondents acknowledged as much (see pp. 3-4, *supra*). There is no logical reason why a defendant who strikes such a bargain should be able to escape from his bargain any more readily than the defendant in *Adamson*. "Respondent[s] [were] fully aware of the likely consequences when [they] pleaded guilty; it is not unfair to expect [them] to live with those consequences now." *Mabry* v. *Johnson*, 467 U.S. at 511.

[20] See *United States* v. *Pratt*, *supra*; *United States* v. *Allen*, *supra*; 2 W. LaFave & J. Israel, *Criminal Procedure* § 20.6, at 680-681 (1984);

Nothing in *Menna* or *Blackledge* affects this analysis, for neither case involved an agreement not to bring other charges in exchange for the defendant's guilty plea. Indeed, in a different context, this Court has distinguished *Blackledge* on just that ground, holding that its analysis does not apply to "the give-and-take negotiation common in plea bargaining between the prosecution and defense." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 362 (1978); *United States* v. *Goodwin*, 457 U.S. 368, 375-380 (1982); see also *Blackledge*, 417 U.S. at 36-37 (Rehnquist, J., dissenting).

The government agreed not to pursue other charges against respondents in reliance on their promise to plead guilty to two Sherman Act conspiracies—not one—yet the result of the decision below is that respondents have secured the full benefit of the government's promise while paying only the fines assessed on one count. Had respondents raised their double jeopardy argument at the time of plea negotiations, the government could have elected to pursue other charges (in particular, Oklahoma conspiracy charges) and either to litigate those charges or to agree that respondents could plead guilty to one Kansas conspiracy and one Oklahoma conspiracy in exchange for the benefits that respondents actually received.[21] But respondents

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Westen, *supra*, 75 Mich. L. Rev. at 1259 (footnote omitted) (a defendant "can * * * forfeit complete defenses to a charge if, by his conduct, he leads the state to believe that it will not have to take him to trial on other outstanding charges"); Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 Mich. L. Rev. 1265, 1293 (1978) ("[i]f the defendant prefers the existing charges to the prospective charges and agrees to forego the double jeopardy defense in exchange for the benefit of not facing the new charges, a court could reasonably respect the bargain, since the government gave up a legitimate opportunity to prosecute in order to please the defendant").

[21] Of course, the government and respondents could also have litigated at the time over the constitutional validity of the two Kansas



chose a different course, withholding their double jeopardy argument until later, and the court of appeals has now rewarded that delay. We know of no double jeopardy principle—and *Menna* and *Blackledge* certainly stand for none—that requires that result.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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charges that actually were brought. Respondents, however, never joined issue on that subject until a year after they pleaded guilty to those charges.

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# In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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**APPENDIX A**

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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Nos. 86-2166 and 86-2202 (D. Kansas)
(D.C. Nos. 81-20119-01 and 82-20011-01)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

RAY C. BROCE AND RAY C. BROCE CONSTRUCTION CO., INC., DEFENDANTS-APPELLEES

---

[Filed: Aug. 18, 1987]

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**ORDER AND JUDGMENT**

Before: LOGAN, BARRETT, and TIMBERS, Circuit Judges.*

This is an appeal from the district court's judgment on remand following this court's en banc decision in *United States v. Broce*, 781 F.2d 792 (10th Cir. 1986). On remand, after reviewing the factual record, the district court held that the two indictments returned against defendants Ray C. Broce and Broce Construction Company, Inc. charged different aspects of the same conspiracy to restrain competition in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Accordingly, the district court vacated the judgment and sentence entered against both defendants on the second indictment.

---

*The Honorable William H. Timbers, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

On appeal, the government first challenges this court's earlier en banc determination that defendant's guilty plea did not bar consideration of the constitutionality of their sentences under the Double Jeopardy Clause. *Broce*, 781 F.2d at 798. The Supreme Court's recent decision in *Ricketts v. Adamson*, 55 U.S.L.W. 4914 (U.S. June 22, 1987), made it clear that a criminal defendant may voluntarily waive his double jeopardy protection. *Id.* at 4916 ("an agreement specifying that charges may be *reinstated* given certain circumstances is . . . *precisely* equivalent to an agreement waiving a double jeopardy defense"). Although *Ricketts* invalidates the broader rationale underlying the plurality opinion in *Broce*, that the double jeopardy prohibition "does not constitute an individual right which is subject to waiver," 781 F.2d at 795, it does not affect its narrower holding, based on clear Supreme Court precedent, that a guilty plea does not itself constitute a waiver of double jeopardy protection. *Id.* at 796-97; *see also Menna v. New York*, 423 U.S. 61, 62-63 & n.2 (1975) (guilty plea is merely an admission of factual guilt, which does not bar a claim that the state may not constitutionally prosecute the defendant no matter how validly his factual guilt is established); *Blackledge v. Perry*, 417 U.S. 21, 29-31 (1974). To the extent that the government's first argument may be read as requesting reconsideration of the court's en banc disposition, we will not do so. 10th Cir. R. 35.6.

The government next argues that the district court's factual finding that both indictments charged a single conspiracy was clearly erroneous. We have examined the record carefully and we are satisfied that the district court's decision was not clearly erroneous. *Cf. United*



*States v. Beachner Construction Co.*, 729 F.2d 1278, 1281-83 (10th Cir. 1984).

AFFIRMED.

Entered for the Court
/s/ JAMES K. LOGAN
James K. Logan
Circuit Judge

Nos. 86-2166 and 86-2202

UNITED STATES OF AMERICA

*v.*

RAY C. BROCE and BROCE CONSTRUCTION CO., INC.

---

BARRETT, Senior Circuit Judge, dissenting:

I respectfully dissent, consistent with my dissenting views expressed in *United States v. Broce*, 781 F.2d 792 (10th Cir. 1986) (En Banc).

I believe that the indictments clearly charged two separate conspiracies. The majority opinion in our *en banc* consideration held that this was a fact question. The trial court, on remand, obviously believed that our *en banc* opinion commanded a finding of a single, continuing conspiracy contrary to the trial court's initial determination. In my view, the district court erred.

If the indictments charged two separate conspiracies to rig bids, as I believe, then the later *factual* determination made in *Beachner II*, based on evidence adduced, that the same bid rigging enterprise constituted but one conspiracy, should have no bearing in this case.

The defendants voluntarily, with advice of competent counsel, entered guilty pleas to charges alleging the existence of separate conspiracies. By so pleading, the defendants admitted that in fact two separate conspiracies existed. The defendants thus were not entitled to rely on an interpretation of facts adduced in a subsequent bid rigging case which led to the court's finding (Beachner II) that the scheme involved only one ongoing, continuing conspiracy.

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**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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No. 81-20119-01

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

BROCE CONSTRUCTION CO., INC., RAY C. BROCE, AND GERALD R. GUMM, DEFENDANTS.

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No. 82-20011-01

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

RAY C. BROCE, AND BROCE CONSTRUCTION CO., INC., DEFENDANTS.

---

[Filed: June 30, 1986]

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**MEMORANDUM AND ORDER**

This matter comes before the court on remand from the Tenth Circuit Court of Appeals. We have been directed to make further factual findings before once again ruling on defendants' motion, pursuant to Fed. R. Crim. P. 35(a), to vacate the judgment and sentence of the court entered in Case No. 82-20011-01. Before engaging in such further finding of fact, we find it useful to recount the procedural history of this action.

The events material to the pending motion began on November 17, 1981, when defendants Ray C. Broce and Broce Construction Co., Inc., were charged in Case No.

81-20119-01 with conspiring to rig bids on a highway construction project in Meade County, Kansas—in violation of section 1 of the Sherman Act, 15 U.S.C. §1. On February 4, 1982, the same two defendants were charged in a separate indictment (Case No. 82-20011-01) with conspiring to rig bids on a highway construction project in Barton County, Kansas—again in violation of section 1 of the Sherman Act. Four days later, and pursuant to plea agreements, defendants entered unconditional guilty pleas to both indictments. On March 15, 1982, we imposed the following sentences on the various Sherman Act violations: (1) as to defendant Broce Construction Co., Inc., a $750,000.00 fine under each indictment, for a total fine of $1,500,000.00, and (2) as to defendant Ray C. Broce, a $50,000.00 fine and two years imprisonment under each indictment (with the two 2-year prison terms to run concurrently), for a total fine of $100,000.00.

Meanwhile, a case involving other Kansas highway construction contractors alleged to have engaged in similar Sherman Act violations had been pending in this court before Judge Saffels. (*Beachner I*) On May 7, 1982, a jury acquitted both Beachner Construction Co., Inc., and its secretary-treasurer on charges that they had violated section 1 of the Sherman Act. Subsequently, Beachner Construction Co., Inc., and the vice-president of that corporation were indicted for Sherman Act violations based on alleged bid rigging in connection with other highway construction projects. (*Beachner II*) Beachner Construction Co., Inc., then moved for dismissal as to it of that second indictment on the ground of double jeopardy.

After a three-day evidentiary hearing, Judge Saffels found that the various instances of bid rigging alleged in the two *Beachner* indictments were merely separate incidents within a single, larger conspiracy to suppress and eliminate competition among highway construction contractors within the state of Kansas. Accordingly, Judge



Saffels concluded that the prosecution of Beachner Construction Co., Inc., under the indictment returned in *Beachner II* would violate the double jeopardy provision of the fifth amendment. Beachner Construction Co., Inc.'s, motion to dismiss that second indictment was therefore granted. *United States v. Beachner Construction Co., Inc.*, 555 F.Supp. 1273 (D. Kan. 1983).

On February 22, 1983, shortly after Judge Saffels had entered his dismissal order in *Beachner II*, defendants in the instant action filed the pending Rule 35(a) motion to vacate the judgment and sentence entered in Case No. 82-20011-01. Citing Judge Saffels' finding that each incident of bid rigging on Kansas highway construction projects during the relevant time period had been pursuant to a single conspiracy to restrain competition, defendants argued that their conviction on both indictments (although entered after guilty pleas) was in violation of the double jeopardy clause. To assist us in ruling on defendants' motion, the parties stipulated that we could consider the factual record made in the *Beachner II* evidentiary hearing before Judge Saffels.

In an unpublished Memorandum and Order of November 18, 1983, we denied defendants' motion to vacate the judgment and sentence entered in Case No. 82-20011-01. Said denial was based on our conclusion that a guilty plea acts as a waiver of a defendant's double jeopardy defense—at least where a second indictment, *on its face*, charges a different offense. *See Menna v. New York*, 423 U.S. 61, 62-63 n.2 (1975) (per curiam). We specifically found that the two indictments at issue in this case did, on their faces, charge different conspiracies to restrain competition. Because defendants, through their guilty pleas, were deemed to have admitted all allegations contained in the two indictments, we saw no need to address the question considered by Judge Saffels in *Beachner II* (i.e., whether the incidents alleged in the two indictments were *in fact* part of a single conspiracy).

On March 22, 1984, a panel of the Tenth Circuit affirmed Judge Saffels' *Beachner II* decision dismissing the second indictment against Beachner Construction Co., Inc. That affirmance was based on the panel's conclusion that the finding of a single conspiracy to restrain competition was not clearly erroneous. *United States v. Beachner Construction Co., Inc.*, 729 F.2d 1278, 1282 (10th Cir. 1984).

On appeal, a panel of the Tenth Circuit reversed our order denying defendants' Rule 35(a) motion to vacate the judgment and sentence entered in Case No. 82-20011-01. *United States v. Broce*, 753 F.2d 811 (10th Cir. 1985). In a split decision, the panel held that defendants' guilty pleas did not effectively waive their right to rely on the defense of double jeopardy and that, moreover, the two indictments were not *facially* inconsistent with the view that they charged but a single conspiracy. Adopting Judge Saffels' findings of fact in *Beachner II*, the panel went on to conclude that the indictments were *factually* based on the same conspiracy. Accordingly, the panel ordered that defendants' motion be granted and that the judgment and sentence entered against them in Case No. 82-20011-01 be vacated.

The Tenth Circuit subsequently vacated the panel decision and granted rehearing en banc. In a decision of January 2, 1986, the full Court of Appeals ordered our decision vacated, but then remanded the matter to us for a factual determination as to whether the two indictments actually charged only a single conspiracy. *United States v. Broce*, 781 F.2d 792 (10th Cir. 1986) (en banc).

Of the seven active judges on the Tenth Circuit at the time of the en banc decision, five chose to write opinions. The plurality opinion (authored by Judge Moore and joined in by Chief Judge Holloway and Judge Logan) and the two concurring opinions (by Judges McKay and Seymour) all agreed that defendants had not waived their



double jeopardy defense by pleading guilty to both indictments. In separate opinions, Judges Barrett and Doyle dissented on that issue. The plurality and concurring opinions further agreed that the two indictments were—on their faces—not inconsistent with a finding that they charged but a single conspiracy. Again, Judges Barrett and Doyle disagreed—finding that the two indictments charged facially distinct conspiracies.

The Tenth Circuit judges were even more divided on the question of whether the two indictments charged *factually* distinct conspiracies. Although expressing some doubt as to whether the two alleged conspiracies were in fact distinct, the plurality chose to remand the case to this court for an initial answer to that factual question. *Id.*, 781 F.2d at 797-98. Judge McKay expressed less interest in the factual question—noting that the vagueness of the two indictments should be construed against the government. Nonetheless, because he had "no objection to joining and giving the trial court the first opportunity to review the issue," *id.*, 781 F.2d at 799, he joined in the decision to remand. Judge Seymour, on the other hand, opposed the decision to remand. In her view, the stipulated incorporation of Judge Saffels' *Beachner II* findings into the record of this case entitled such findings to "full preclusive effect." 781 F.2d at 792. She thus concluded that, as a matter of law, the two indictments returned against these defendants were factually based on the same conspiracy. In dissent, Judge Barrett agreed that the *Beachner II* findings would ordinarily be entitled to preclusive effect; but he opposed application of that doctrine here because defendants had entered their guilty pleas *before* Judge Saffels made his *Beachner II* findings. *Id.*, 781 F.2d at 810-11. Judge Doyle stood alone in concluding that the two indictments did, in fact, charge different conspiracies. *Id.*, 781 F.2d at 823.

Our task on remand was spelled out by Judge Moore in his plurality opinion. That opinion noted that "the question of whether the indictments charged one or two conspiracies is, in the context of this case, wholly factual." 781 F.2d at 797. Accordingly, the case was "remanded for a factual determination *on only the evidence originally presented upon the filing of defendants' motions,* including the stipulation between the parties." 781 F.2d at 798 (emphasis added). Because the record on remand was thus limited, we ordered the issue submitted on the briefs of the parties—without a further evidentiary hearing. Both the government and defendants have submitted memoranda of law, and we are now prepared to rule.

Throughout the consideration of defendants' Rule 35(a) motion, three issues have predominated. First, did defendants' guilty pleas to the two indictments constitute a waiver of their double jeopardy defense? Second, did the two indictments, on their faces, charge separate conspiracies? And, third, did the two indictments, as a factual matter, charge separate conspiracies? At this point, the first two issues have been definitively resolved. The guilty pleas have been held *not* to have waived defendants' double-jeopardy defense. And the two indictments have been held, if not facially in violation of the double jeopardy clause, then at least sufficiently vague to permit a resort to the underlying facts to determine whether such a violation has occurred.

The only issue remaining for resolution, then, is whether the two indictments returned against these defendants charge *factually* distinct conspiracies. As explained above, our original disposition of defendants' motion made it unnecessary for us to consider this factual question. We thus have yet to address the effect of Judge Saffels' *Beachner II* findings on the resolution of this issue. It is to those findings that we now turn our attention.



In his *Beachner II* Memorandum and Order, Judge Saffels noted at least six factors in support of his finding that the various bid rigging episodes in the Kansas highway construction industry were part of a single conspiracy to restrain competition—continuing as late as the incidents underlying these two indictments. First, Judge Saffels found that the construction contractors active in the state during that period had a "common objective." *See United States v. Wilshire Oil Co. of Texas*, 427 F.2d 969, 976 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970). That objective was to eliminate competition among the state's contractors—an objective that had not changed "for nearly a quarter century." *Beachner II*, 555 F.Supp. at 1279.

Second, Judge Saffels noted that the separate bid riggings had been effected through a "common method." That is, a contractor wishing to obtain a particular contract would ask other contractors either to refrain from bidding on that project or, in some cases, to submit a "complementary bid." Such bids, always somewhat higher than the bid of the contractor to whom it was agreed the contract would go, were designed to convince the state that competitive bidding had taken place. In return for submitting a complementary bid, a contractor could expect other contractors to submit such bids on a later project as to which the conspirators had agreed that the first contractor would be the low bidder. *Id.*, 555 F.Supp. at 1277-78.

Third, the conspiring contractors used and understood "common jargon." As found by Judge Saffels, in addition to "complementary bid" (also called "comp bid"), the contractors referred to the process of negotiating for complementary bids as "setting-up" a job. They also referred to a contractor's acquiescence in the bid rigging process as a decision to "go along." *Id.*, 555 F.Supp. at 1277.

Judge Saffels' fourth factor grew, in part, from the contractor's use of common jargon. That is, "none of the [contractors] expressed any fear or concern that approaching a

fellow contractor about this illegal activity would result in their being reported to the authorities." *Id.* The contractors thus exercised little or no precautions when "setting-up" a job. As a matter of self-preservation, one who attempts to initiate a new conspiracy to violate the antitrust laws generally proceeds with caution for fear that the competitor to whom he broaches the idea will inform the authorities of the scheme. As Judge Saffels noted, the absence of such expected precautions in this context clearly suggests that the contractors were *not* initiating a new conspiracy each time the state asked for bids on a new project.

Fifth, Judge Saffels characterized the process of requesting and submitting complementary bids as the creation of "mutual and interdependent obligations . . . among contractors who participated in 'set-up' jobs." *Id.*, 555 F.Supp. at 1278. Of the factors cited by Judge Saffels, this is perhaps the most persuasive. To label the negotiations relating to each construction project as a separate conspiracy would suggest that some contractors conspired to *lose* what might otherwise have been a profitable contract. Only by considering the various contracts as interrelated parts of a single conspiracy can one explain why contractors would intentionally forego the right to submit a competitive bid on a particular project.

Finally, the sixth factor cited by Judge Saffels was his finding that "[t]he conspiracy was continuously present and could be 'plugged into' at any time." *Id.* Judge Saffels conceded that a number of projects were bid competitively—usually when out-of-state or other unwilling contractors were bidding, or when the letting occurred during a slow period for the construction industry. Nonetheless, when road construction contracts were more plentiful and all potential bidders were willing to invoke the standard procedures for "setting-up" a contract, the continuing existence of the conspiracy made collusion possible.



In conjunction with its brief on remand, the government has submitted a number of exhibits. Our examination of those exhibits, as well as our consideration of the arguments raised in the government's brief, fails to convince us that Judge Saffels' *Beachner II* findings should be rejected. We thus adopt those factual findings for purposes of defendants' Rule 35(a) motion.

Because the two indictments returned against these defendants charge simply different aspects of the same conspiracy to restrain competition, we conclude that the defendants' conviction under both indictments (even though obtained through guilty pleas) constituted a violation of their rights under the double jeopardy clause of the fifth amendment. Pursuant, therefore, to Fed. R. Crim. P. 35(a), we will vacate the judgment and sentence entered against both defendants on the indictment in Case No. 82-20011-01. The government's request for resentencing in Case No. 81-20119-01 will be denied.

IT IS THEREFORE ORDERED that the judgment and sentence entered against defendants Broce Construction Co., Inc., and Ray C. Broce in Case No. 82-20011-01 are hereby vacated. The judgment and sentence entered against both defendants in Case No. 81-20119-01 shall stand.

Dated this 30th day of June, 1986, at Kansas City, Kansas.

/s/ EARL E. O'CONNOR
Earl E. O'Connor, Chief
Judge

**APPENDIX C**

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

---

Nos. 83-2558
83-2559

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.,
DEFENDANTS-APPELLANTS

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Appeal From the United States District Court
for the District of Kansas
(D.C. Nos. 82-20011-01 and 81-20119-01)

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[Filed: Jan. 2, 1986]

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ON REHEARING EN BANC

Before: HOLLOWAY, Chief Judge, DOYLE, BARRETT, McKAY, LOGAN, SEYMOUR, and MOORE, Circuit Judges.

MOORE, Circuit Judge.

These cases are before the court for rehearing *en banc*. The questions presented are whether a plea of guilty constitutes a waiver of a defendant's right to assert a violation of the Double Jeopardy Clause of the Fifth Amendment and whether the second of two indictments charging a Sherman Act conspiracy is duplicitous of the first. We



hold that a guilty plea does not waive the defense of double jeopardy under the circumstances of this case. We further hold the record requires a remand of this case for a hearing to determine as a matter of fact whether the acts charged constituted one or two conspiracies. We therefore reverse the judgment of the district court.

On November 7, 1981, a two count indictment was returned charging defendants, Ray C. Broce and Broce Construction Co., Inc., with conspiracy to violate the Sherman Act, 15 U.S.C. §1. In the second count, Mr. Broce was charged with mail fraud, 18 U.S.C. § 1341. On February 4, 1982, a second indictment was returned charging Mr. Broce and the corporation in one count with violation of 15 U.S.C. § 1.

On February 8, 1982, pursuant to a plea agreement between the government and the two defendants, Mr. Broce appeared and entered pleas of guilty to both indictments in his own behalf and as president of the corporation. Subsequently, Broce was sentenced to concurrent two-year terms and fined $50,000 on the conspiracy counts of both indictments. The corporation was fined $750,000 on each indictment.

One year later, both defendants filed motions pursuant to Fed. R. Crim. P. 35(a) to vacate the judgments alleging their conviction on the second indictment violated the Double Jeopardy Clause of the Fifth Amendment. The defendants asserted the conspiracy counts charged a single transaction rather than two separate conspiracies; hence, the second charge was unconstitutionally duplicitous and void. This contention was motivated by a ruling from another judge in the same district dismissing an indictment in a companion case.

The defendants, Broce and the Broce Construction Company, were actively engaged in the highway construction business in the state of Kansas for a number of years prior to the indictments. Indeed, these indictments grew

out of that very activity, as did the indictment in the companion case, *United States v. Beachner Construction Co., Inc.*, 555 F. Supp. 1273 (D. Kan. 1983). In *Beachner*, as here, the defendants had been indicted on a charge of conspiracy to rig bids on a particular Kansas highway project. After trial and acquittal on this charge, the defendants were again indicated on a second conspiracy charge connected to a different highway project. *Id.* at 1274. Prior to trial, the defendants moved to dismiss the indictment on double jeopardy grounds. After a three-day evidentiary hearing pursuant to *Abney v. United States*, 431 U.S. 651 (1977), the trial court concluded there had been a pervasive conspiracy to rig bids in the Kansas highway construction industry that had existed for "in excess of twenty-five years." *Beachner, supra,* at 1277. Accordingly, the court dismissed the indictment and the government appealed. The ruling was affirmed by this court. *United States v. Beachner Construction Co., Inc.*, 729 F.2d 1278 (10th Cir. 1984).

The hearing from which the present appeal emanates occurred after the *Beachner* appeal but before our affirmance of the dismissal. In order to focus the issue in this case, Broce and the government stipulated that the record of the *Beachner* hearing could be considered by the trial court in ruling on appellants' Rule 35 motion. That record is also before us. Following the hearing, and before the publication of our opinion in *Beachner*, the trial court denied relief, holding as a matter of law, the defendants had waived their right to raise the double jeopardy issue by their guilty pleas. This appeal followed.

The panel which originally heard this case ordered reversal of the trial court's judgment. *United States v. Broce,* 753 F.2d 811 (10th Cir. 1985). That opinion was vacated and rehearing was granted to consider whether the guilty pleas are admissions by the defendants that there were actually two conspiracies and whether the defendants



could collaterally attack the foundations of an indictment following a plea of guilty.

I.

The government contends a fundamental principle in this circuit is that the double jeopardy defense is personal and subject to waiver. *Cox v. Crouse*, 376 F.2d 824 (10th Cir.), *cert. denied*, 389 U.S. 865 (1967); *Caballero v. Hudspeth*, 114 F.2d 545 (10th Cir. 1940). On that premise the government argues that an unconditional plea of guilty constitutes that waiver, *Caballero, supra,* and precludes a challenge of the indictment. Although the panel held that *Menna v. New York*, 423 U.S. 61 (1975), and *Blackledge v. Perry*, 417 U.S. 21 (1974), compel a reversal of *Cabellero*, the government takes issue with this result. The government further postulates allowing a collateral attack will encourage defendants to challenge their sentences "long after their guilty pleas are entered, thus undermining the finality of convictions and increasing the already heavy workload of the federal courts."

These contentions were considered and rejected in *Blackledge, supra.*[1] There, in response to an argument that a due process claim could not be asserted following a guilty plea, the Supreme Court stated when the claim of constitutionality goes to "the very power of the State to bring the defendant into court to answer the charge," a guilty plea does not waive the constitutional issue. *Blackledge*, 417 U.S. at 30.

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[1] The government seeks to avoid the implication of *Blackledge* with the argument *Blackledge* is a due process and not a double jeopardy case. While that statement is true, it does not negate the clear impact the case has upon collateral attack following guilty pleas. This impact is the same whether the complaint is grounded in due process or double jeopardy when the right asserted goes to the government's power to file charges. *Blackledge, supra.*

The essential right with which the court dealt in *Blackledge* and with which we are concerned here is the "right not to be haled into court at all." *Blackledge*, 417 U.S. at 30. Indeed, as the court noted in *Robinson v. Neil:*

> The guarantee against double jeopardy is significantly different . . . . While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result *is to prevent a trial from taking place at all* . . . .

409 U.S. 505, 509 (1973) (emphasis added).

This is the first occasion we have had to reconsider the nature of the double jeopardy right and its effect on a guilty plea since *Blackledge* and *Menna.*[2] The present opportunity convinces us our previous holding in *Caballero* is no longer apposite. As already noted in *Menna, supra,* and *Robinson, supra,* the Fifth Amendment's Double Jeopardy Clause stands as an inhibition upon the government's right to institute charges. This inhibition is absolute, and even though the bar works as a protection of individuals, it does not constitute an individual right which is subject to waiver. If the absence of constitutional authority prevents the government from instituting charges in the first instance, a defendant's guilty plea cannot confer authority upon the government to do what the Constitution prohibits. In light of this fundamental constitutional concept, the doctrine of waiver has no significance.[3]

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[2] The question was raised but not dealt with in *Bromley v. Crisp*, 561 F.2d 1351 (10th Cir. 1977), *cert. denied,* 435 U.S. 908 (1978).

[3] The government argues our holding in *United States v. Rich*, 589 F.2d 1025 (10th Cir. 1978) decided after *Blackledge* and *Menna* indicates our adherence to the concept of waiver despite the assertion of a constitutional defect. The government urges the panel ignored the established law in the circuit. That argument is based upon an overbroad reading of *Rich*, for that case did not deal with the Double Jeopardy Clause in the context presented here. Additionally, the pre-*Blackledge* cases from this circuit relied upon by the government



Hence, the Broce guilty pleas do not constitute a bar to questioning whether the Double Jeopardy Clause prohibits the institution of the second indictment and vitiates those very pleas. It also follows that if the institution of the charge under attack is constitutionally defective, it is not a significant concern that collateral attack affects the finality of the judgment. If the charge upon which the judgment is based is constitutionally infirm, either on due process or double jeopardy grounds, that judgment cannot be "final." *Cf. Haring v. Prosise,* __U.S.__, 103 S.Ct. 2424 (1983).

The government argues that "almost every other court of appeals that has considered the issue [of waiver] since *Blackledge* and *Menna* has held that double jeopardy is a personal defense that is waived by a guilty plea where, as here, the plea is the result of a plea bargain." This argument is not well-founded. Examination of the cases cited in support of the government's proposition discloses neither *Blackledge* nor *Menna* were considered. *See United States v. Solomon*, 726 F.2d 677 (11th Cir. 1984); *United States v. Herzog*, 644 F.2d 713 (8th Cir.), *cert. denied*, 451 U.S. 1018 (1981); *Brown v. State*, 618 F.2d 1057 (4th Cir.), *cert. denied, sub nom. Brown v. Maryland*, 449 U.S. 878 (1980); and *United States v. Perez*, 565 F.2d 1227 (2d Cir. 1977).

In addition, the government suggests allowing the defendants to challenge their pleas is both inconsistent

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are equally inapposite. *See Brace v. Zerbst,* 93 F.2d 8 (10th Cir. 1937); *Cox v. Crouse*, 376 F.2d 824 (10th Cir.), *cert denied,* 389 U.S. 865 (1967). The government also cites *United States v. Bascaro*, 742 F.2d 1335 (11th Cir.), *cert. denied,* __U.S.__, 105 S.Ct. 3476 (1985), as a "waiver" case. Examination shows, however, the "waiver" was a failure to preserve the issue for appeal by failing to raise it in the trial court. The reliance is misplaced.

and inequitable. In reliance upon *Kerrigan v. United States,* 644 F.2d 47 (1st Cir. 1981), the government argues a defendant who pled guilty cannot be permitted to make arguments "inconsistent with the factual and theoretical foundations of the indictment." On this premise, the government contends *Kerrigan* supports the government's waiver theory. Yet, in discussing the issue of the defendant's waiver, the *Kerrigan* court did not consider *Blackledge* or its effect on the issue. Since *Blackledge* is the keystone in the issue of waiver under consideration here, *Kerrigan* cannot be regarded as persuasive authority.[4] Accordingly, the cardinal principle that the government's authority to charge is not subject to waiver by the accused has not been undercut since *Blackledge* and must remain the principle by which we are guided here.

Contrary to the government's insistence upon equity, the defendants' plea bargain cannot work an estoppel of their right to assert the invalidity of the charge. When the government enters into an agreement which is fashioned upon a constitutionally infirm charge, it cannot be heard to claim equity prohibits the defendants from raising the fundamental infirmity of the charging power. The government argues that because adherence to the plea agreement required it to forsake the possibility of instituting additional conspiracy charges in another district, it would be unfair to allow the defendants to obtain the benefits of the plea bargain and avoid the detriments. This argument overlooks that the government was without power to institute one of the charges upon which the plea agreement was based. In effect, that agreement was partially founded upon a nullity. As a matter of immutable principle, the government's constitutional inability to charge in the first

[4] Moreover, careful reading discloses the *Kerrigan* district court did not rule on the question of waiver; hence, the discussion of that topic by the circuit court is dictum.



instance is not diminished simply because it bargained away a prosecutorial advantage. The fundamental right not to be haled into court cannot be compromised on such grounds.

The government has also argued the defendants' pleas of guilty must be considered admissions of all the facts alleged in the indictments; therefore, they cannot contest the validity of the second charge. The prosecution contends that the indictments effectively alleged the existence of two conspiracies; therefore, having admitted that allegation by their pleas of guilty, the defendants cannot be heard to contend there was only one conspiracy in fact. *United States v. Kerrigan, supra.* The argument is unpersuasive. First, as distinguished from *Kerrigan*, the present indictments did not specifically allege separate conspiracies. While the second indictment alleged a conspiracy to rig bids on particular highway projects, it contained no specific charge that the conspiracy itself was separate from the conspiracy alleged in the first indictment. Second, the admissions of factual guilt subsumed in the pleas of guilty go only to the acts constituting the conspiracy and not to whether one or more conspiracies existed. *Launius v. United States*, 575 F.2d 770 (9th Cir. 1978).

Accordingly, we now hold, as mandated by *Menna*, a defendant's plea of guilty to a constitutionally duplicitous charge is not a waiver of that defendant's right to assert a double jeopardy claim. While there have been many cases which have held to the contrary, none of those have dealt with what *Blackledge* has characterized as the right not to be haled into court and what we recognize as the government's lack of constitutional power to charge. We find ourselves aligned with the Ninth Circuit in *Launius* and give full cognizance to the true nature of the double jeopardy right.[5]

[5] *See also United States v. Broussard,* 645 F.2d 504 (5th Cir. 1981).

II.

The remaining question is whether the indictments to which the defendants pled charged one or two Sherman Act conspiracies. As in *Beachner, supra,* a detailed paragraph by paragraph comparison of the two Broce indictments reveals their virtual identity except for references to different Kansas highway projects. Thus, on their face the two indictments do not appear to charge different conspiracies.

As previously indicated, the parties stipulated in the trial court that the transcript from the evidentiary hearing on the double jeopardy issue in *Beachner* would be incorporated in the record in this case. Thus, our opinion in *Beachner* must have weight here. The government asserts our previous ruling has no bearing on this case because we merely held in *Beachner* the findings of the trial court were not clearly erroneous. The government also argues that the question of whether the charges were of single or multiple conspiracies must be resolved from the face of the indictments, and not from the underlying facts.

Whatever the approach taken in other cases in determining the nature of the charged conspiracy, the stipulation to include consideration of the *Beachner* transcript presents a unique case and permits inquiry behind the indictment. Having conceded the applicability of the facts developed in that hearing, the government is not in the position to argue our examination of the issue must be confined to the pleadings. Can that stipulation by the government be regarded as anything but a concession on its part that the facts of the two cases are so intertwined that one is relevant to the other in consideration of the same legal issue? We think not.

We now have before us a case which is factually linked to another in which we have already found testimony that established a "continuous, cooperative effort among Kansas asphalt contractors to rig bids" for "more than twenty-



five years." *Beachner,* 729 F.2d at 1282. Moreover, that testimony established the existence of a "common method" of bid-rigging that was "well-known" and open among all the contractors. *Id.* We found evidence that "mutual and interdependent obligations were created between participating contractors" and that "the bid-rigging scheme was self-perpetuating in nature." *Id.* We then added: "The evidence showed that asphalt contractors in Kansas understood for over twenty-five years that the ability to rig bids was available using the aforementioned method. There was, therefore, no lack of conspiratorial agreement in this case." *Id.* at 1283.

When the two indictments are viewed in this factual matrix, a significant question arises whether, under the unique circumstances of this case, the defendants stood charged with participation in only one long-standing conspiracy. Moreover, on the face of the indictments, it appears the transactions set forth were mere elements in that conspiracy, and not independent conspiracies themselves. *Compare United States v. Behrens,* 689 F.2d 154(10th Cir. 1982); *United States v. McMurray,* 680 F.2d 695 (10th Cir. 1981); *United States v. Palermo,* 410 F.2d 468 (7th Cir. 1969).

Notwithstanding, the question of whether the indictments charged one or two comspiracies is, in the context of this case, wholly factual. Despite the existence of the *Beachner* record and our opinion in that case, the trial court has made no determination of those essential facts, and we are not wont to do so. While *Beachner* could logically be regarded as a significant signpost, our system requires the road to be first chosen by the trial court and not by us. In this instance, what must follow is a determination of the kind mandated in *Abney v. United States,* 431 U.S. 651 (1977), and we must remand for that purpose. We are therefore returning this case for further proceedings at the point at which the trial court arrived at an erroneous conclusion.

We hold the defendants' plea of guilty is not a bar in this case to consideration of whether the charge contained in the second indictment is void because of the Double Jeopardy Clause of the Fifth Amendment. The judgment of the trial court denying the defendants' motion to vacate sentence in 83-2558 is reversed, and the case is remanded for a factual determination on only the evidence originally presented upon the filing of defendants' motions, including the stipulation between the parties. There being no error alleged in 83-2559, the appeal is dismissed.



Nos. 83-2558 and 83-2559

UNITED STATES OF AMERICA

*v.*

RAY C. BROCE and BROCE CONSTRUCTION COMPANY, INC.

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McKAY, Circuit Judge, concurring:

I concur fully in part I of the majority's opinion. I join in part II of the majority opinion insofar as it remands to the trial court to give it the first opportunity to consider that issue. I do so reluctantly because I believe the matter is clear enough on the record before us to establish as a matter of law that the second indictment charging the defendant with violation of the Sherman Act in connection with a conspiracy to rig bids on another Kansas highway construction project violates the double jeopardy clause. I base this conclusion upon my agreement with this court's panel opinion in the instant case, authored by Judge Bohanon. *United States v. Broce*, 753 F.2d 811 (10th Cir. 1985). In that opinion, this court stated:

> Facts therefore now appearing in this record lead to the conclusion that the defendants have been twice punished for their participation in a single continuing conspiracy. Because their double jeopardy rights have been so violated, the judgment and sentence entered under the second indictment below were illegal and the defendants' Rule 35(a) motion must be granted.
>
> Accordingly, the judgment and sentence entered by the district court on March 15, 1982 in case No. 83-2558 is hereby vacated.

*Id.* at 823.

My views are based, as were Judge Bohanon's, on the similarity between the two indictments with which the defendants were charged, along with the lack of specificity of those indictments. As Judge Bohanon aptly stated:

> The indictments state approximate beginning dates for the conspiracies but give no conclusion dates,

stating merely that they were "continuing." Nothing in the first indictment would preclude a finding that the conspiracy alleged therein was "continuing" throughout the period encompassed by the second indictment. The indictments do not even specify with definiteness who was involved in the alleged conspiracies. Nothing would preclude a finding that all of the people participating in the first alleged conspiracy were also participants in the second. And finally, as noted previously, there is nothing in the first indictment to indicate that the agreement and conspiracy described therein with regard to Project No. 23-60-RS-1080(9) did not also encompass other projects and and [sic] other bid-letting dates. Indeed, nothing in either indictment is definitely inconsistent with the view that the conspiracies they allege are in fact identical, and, further, are identical with the ongoing conspiracy to rig bids, extending over a period exceeding a quarter century . . . .

*Id.* at 820.

The rationale behind my view that this court should vacate the judgment and sentence entered in Case No. 83-2558 can be found in *Short v. United States,* 91 F.2d 614 (4th Cir. 1937):

> Blanket charges of "continuing" conspiracy with named defendants and with "other persons to the grand jurors unknown" fulfill a useful purpose in the prosecution of a crime, but they must not be used in such a way as to contravene constitutional guarantees. If the government sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred, and that this result cannot be avoided by charging the conspiracy to have been



> formed in another district where overt acts in furtherance of it were committed, or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first. And, if two indictments charging continuing conspiracy and covering the same period in whole or in part are drawn with blanket coverage "with other persons to the grand jurors unknown," a plea of former jeopardy should be submitted to the jury if there is proof that the same partnership in criminal purposes is prosecuted by both, even though the appearance of identity of offenses may have been avoided in the indictment by charging a different place of conspiracy, or by joining additional defendants, or by charging different overt acts, or by charging the violation of additional statutes as being among the objects of the conspiracy. The constitutional provision against double jeopardy is a matter of substance and may not be thus nullified by the mere forms of criminal pleading.

*Id.* at 624. I, along with Judge Bohanon, believe that "the government cannot be allowed to evade the Double Jeopardy Clause by using vague indictments, facially distinguishable only by their reference to different overt acts, here, the submission of rigged bids on different construction projects." *Broce,* 753 F.2d at 822. Accordingly, while I do not believe that this case needs to be resubmitted to the trial court for determinations of fact, I have no objection to joining in giving the trial court the first opportunity to review the issue. I therefore join in the judgment to remand.

Nos. 83-2558, 83-2559

UNITED STATES

*v.*

BROCE, ET AL.

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SEYMOUR, Circuit Judge, concurring in part and dissenting in part.

This case presents a difficult problem concerning the Double Jeopardy Clause of the Fifth Amendment, which declares that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb . . . ." I agree that defendants' guilty pleas did not forfeit their right to challenge the indictments on double jeopardy grounds. I must respectfully disagree, however, with the broad conclusion that the Double Jeopardy Clause embodies not "an individual right which is subject to waiver,"[1] but an "absolute inhibition" upon government. *See* Majority Op. at 6. Although alluring for its clarity in an area of law which is anything but clear, in my view such a rule conflicts with the Supreme Court's consistent approval of knowing and voluntary waivers of constitutional rights. I also disagree with the conclusion that this case must be remanded to determine whether the Double Jeopardy Clause was in fact violated. I would hold that it has been and would vacate the second Sherman Act conspiracy conviction and sentence.

The notion of waiver embodies the aspiration that individuals should be entitled to decide for themselves

[1] For purposes of consistent analysis, forfeiture may be defined as the loss of a constitutional defense through the operation of law and without regard for a defendant's intentions. In contrast, waiver connotes an informed, deliberate, and uncoerced decision to relinquish such a defense. *See* Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214 (1977).



whether to invoke constitutional protections. As the Supreme Court stated in *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279-80 (1942):

> "[T]he procedural safeguards of the Bill of Rights are not to be treated as mechanical rigidities. What were contrived as protections for the accused should not be turned into fetters . . . .
>
> " . . . When the administration of the criminal law in the federal courts is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison [him] . . . in his privileges and call it the Constitution."

The Court has thus consistently allowed criminal defendants to relinquish constitutional rights. *See, e.g., Garner v. United States*, 424 U.S. 648 (1976) (freedom from self-incrimination); *Barker v. Wingo*, 407 U.S. 514 (1972) (speedy trial); *Boykin v. Alabama*, 395 U.S. 238 (1969) (trial of any kind); *Brookhart v. Janis*, 384 U.S. 1 (1966) (confrontation of witnesses); *Fay v. Noia*, 372 U.S. 391 (1963) (claims otherwise reviewable via habeas corpus); *Adams*, 317 U.S. 269 (counsel and jury trial). To be sure, the waiver of any such right must be knowing and voluntary, and courts should " 'indulge every reasonable presumption against waiver . . . .' " *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citations omitted); *see also* Tigar, *The Supreme Court, 1969 Term, Forward: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 Harv. L. Rev. 1 (1970). When these conditions are properly fulfilled, the relinquishment of constitutional rights is permissible.

The Court has countenanced no exception for the Double Jeopardy Clause. In the seminal case of *Kepner v. United States*, 195 U.S. 100 (1904), the Court characterized freedom from double jeopardy as a right which may not be denied a defendant " 'without his consent.' " *Id.*

at 131 (quoting 1 Bishop, Criminal Law § 1026 (5th ed.)). In *Green v. United States*, 355 U.S. 184 (1957), the Court described the right in ostensibly personal terms:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . .
>
> " . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

*Id.* at 187-88.[2] The Court then held that the right had not been waived in the circumstances of that case:

> "Nevertheless the Government contends that Green 'waived' his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a *successful* appeal of his improper conviction of second degree murder. We cannot accept this paradoxical contention. 'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. Cf. Johnson v. Zerbst, 304 U.S. 458."

[2] *See also Robinson v. Neil*, 409 U.S. 505, 509 (1973) (describing guarantee against double jeopardy as "a constitutional right of the criminal defendant").



*Id.* at 191 (emphasis in original). In *Schneckloth v. Bustamonte*, 412 U.S. 218, 237-38 (1973), the Court listed "the right to be free from twice being placed in jeopardy" as one of those rights to which the *Zerbst* standard of knowing and intelligent waiver had been applied, specifically citing *Green*.

The subsequent cases of *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975) (per curiam), in no way mark a retrenchment from the Court's waiver jurisprudence or its conception of the Double Jeopardy Clause. *Blackledge* and *Menna* characterize the right in "jurisdictional" terms in order to delimit the circumstances under which a valid forfeiture—not waiver—may occur. Both cases hold that a mere guilty plea does not forfeit an unambiguous claim that the prosecution lacked all power to hale a defendant into court.[3] As explained in *Menna*:

> "Neither *Tollett v. Henderson*, 411 U.S. 258 (1973), nor our earlier cases on which it relied, *e.g.*, *Brady v. United States*, 397 U.S. 742 (1970), and *McMann v. Richardson*, 397 U.S. 759 (1970), stand for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations. . . . *[I]n Tollett we emphasized that waiver was not the basic ingredient of this line of cases*, 411 U.S. at 266. The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. *A guilty plea, therefore, simply*

[3] I would overrule *Caballero v. Hudspeth*, 114 F.2d 545, 547-48 (10th Cir. 1940), to the extent it holds otherwise, but would leave intact its characterization of the guarantee against double jeopardy as a personal right.

> *renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established.* Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim."

423 U.S. at 62-63 n.2 (emphasis added); *see also Haring v. Prosise*, 462 U.S. 306, 319-21 (1983).[4] *Blackledge* and *Menna* recall *Green:* the nature of the guarantee against double jeopardy restricts what may qualify as a valid forfeiture, but does not negate the possibility of a deliberate waiver. The *Menna* Court thus explicitly declined to rule that a double jeopardy claim may never be waived. *See* 423 U.S. at 62-63 n.2.

Characterizing a right in jurisdictional terms simply does not make it any less personal or necessarily immune from waiver. In *Johnson v. Zerbst*, the Court identified the right to counsel as a "jurisdictional prerequisite" to the commencement of criminal proceedings:

> "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, *compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence.* If the accused, however, is not represented by counsel and has not competently and

[4] In *Haring*, the Court held that a guilty plea does not establish that a defendant has waived any Fourth Amendment claims he seeks to pursue under 42 U.S.C. § 1983, notwithstanding that he may have forfeited the opportunity to raise the identical issue in a habeas corpus proceeding.



> intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty."

304 U.S. at 467-68 (emphasis added). Like the guarantee against double jeopardy described in *Menna*, the right to counsel deprives a court of power to proceed against an accused who is unrepresented. Yet *Zerbst* was a landmark decision precisely because of its statement that such a right may be knowingly and voluntarily relinquished. *See id.* at 465. It thus does not follow from the Court's jurisdictional characterization that the guarantee against double jeopardy is somehow exceptional and may never be deliberately relinquished.[5] *Accord Launius v. United States*, 575 F.2d 770, 772 (9th Cir. 1978).

Although I conclude that a double jeopardy claim may be waived, I agree with Judge Bohanon, author of the panel opinion, that there has been no waiver in this case. *Menna* confirms that any waiver of a double jeopardy claim must be deliberate in the sense envisioned by *Zerbst*. The defendant in *Menna* had raised the defense prior to pleading guilty. The New York Court of Appeals therefore construed his guilty plea as a knowing and voluntary waiver. *See People v. Menna*, 36 N.Y.2d 930, 373 N.Y.S.2d 541 (1975). In reversing, the Supreme Court held that a guilty plea relates only to factual guilt

[5] Lower federal courts, including this one, have actually gone further in another context: litigants may consent to the exercise of subject matter jurisdiction and attendant Article III powers by non-Article III magistrates, irrespective of the rights being adjudicated. *See, e.g., United States v. Dobey*, 751 F.2d 1140 (10th Cir. 1985) (appeal pending); *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir.) (en banc), *cert. denied*, 105 S.Ct. 100 (1984); *Wharton-Thomas v. United States*, 721 F.2d 922 (3d Cir. 1983).

and does not by itself imply a deliberate decision to relinquish a legal claim, notwithstanding that the defendant was aware of the claim at the time of his plea. *See Menna*, 423 U.S. at 62-63 n.2. An affirmative and unambiguous indication of waiver is thus required. Indeed, as a practical matter, "[a] double jeopardy defense is normally not the type of claim that would be foregone for some strategic purpose." *United States v. Anderson*, 514 F.2d 583, 586 (7th Cir. 1975).

In this case, defendants did not receive a copy of the second indictment until almost four days after its filing. They pleaded guilty the same day. The record indicates that a waiver of double jeopardy rights was neither bargained for by the Government nor otherwise discussed with defense counsel. Counsel's uncontroverted affidavit reveals that defendants did not consider the question of double jeopardy prior to pleading guilty. Before accepting defendant's pleas, the trial judge recited a litany of constitutional rights, but did not mention the Double Jeopardy Clause. Even without invoking the presumption against waiver of constitutional safeguards, it is clear that defendants did not *deliberately* relinquish their right to challenge the indictments against them.

In dissent, Judge Barrett argues that defendants forfeited their double jeopardy claim by failing to raise the issue below as required by Fed. R. Crim. P. 12(b)(2). *See* Barrett Dissent at 19-24. The rule provides:

> "(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trail of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. *The following must be raised prior to trial:*
>
> . . . .
>
> (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings) . . . ."



Fed. R. Crim. P. 12(b)(2) (emphasis added). Professor Wright has answered the Rule 12 forfeiture argument as follows: "As a pleading matter this may well be true. The vice however, of multiplicity is that defendant may be given multiple sentences for a single offense. If this happens, the sentence is illegal and may be corrected at any time." 1 C. Wright, Federal Practice & Procedure § 193, at 702 n.31 (2d ed. 1982); *see also id.* § 145, at 525-26 & n.14.

> " 'The argument that one waives his right to object to the imposition of multiple sentences by his fail[ing] to object to the multiplicious nature of an indictment is a *non sequitur*. Rule 12 applies only to objections with regard to the error in the indictment itself; the effect of Rule 12 is that dismissal of a multiplicious indictment is not required; however, if sentences are imposed on each count of that multiplicious indictment the defendant is not forced to serve the erroneous sentence because of any waiver.' "

*Launius*, 575 F.2d at 772 (quoting *United States v. Rosenbarger*, 536 F.2d 715, 721-22 (6th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977)); *see also United States v. Mastrangelo*, 733 F.2d 793, 800 (11th Cir. 1984); *United States v. Marino*, 682 F.2d 449, 454 n.3 (3d Cir. 1982). It is noteworthy that Rule 12(b)(2) excepts jurisdictional issues from those which must be raised pretrial. Given the Supreme Court's characterization of double jeopardy and the facts of *Menna*, it is apparent that Rule 12(b)(2) is no bar to raising a double jeopardy claim even post trial. Although Broce's prison sentences ran concurrently, both he and his company received cumulative fines on the two indictments. They did not forfeit the right to contest the constitutionality of those fines by failing to raise the issue during the brief interval before pleading guilty.

The question remains whether the Double Jeopardy Clause has been violated. Judge Barrett would hold that the indictments facially charged two separate conspiracies and that, by pleading guilty to the facts alleged in the indictments, Broce is factually barred from claiming a double jeopardy violation. Barrett Dissent at 11-14. The majority declares the double jeopardy question to be one of fact which must first be determined by the trial court on remand. Majority Op. at 12.

If the indictments in this case alleged two separate conspiracies with sufficient clarity and specificity, then a plea of guilty to each arguably could be construed as establishing that two such conspiracies existed. As an example, Judge Barrett relies upon the case of *Kerrigan v. United States*, 644 F.2d 47 (1st Cir. 1981). The indictments against Kerrigan clearly charged two separate conspiracies to transport stolen goods in interstate commerce. One conspiracy allegedly occurred between the specific dates of August 25 and September 1, 1977, with two named co-conspirators. The other, involving different goods, allegedly occurred between September 1 and September 22, 1977, with only one of the previously named co-conspirators. The court held that Kerrigan could raise a double jeopardy claim only by repudiating the alleged facts to which he had pleaded guilty:

> "Evaluated in this way, Kerrigan's claim is quite different from that asserted in *Launius*; far from being facially multiplicitous, as in *Launius*, Kerrigan's indictments sufficiently describe two separate and distinct offenses, for which Kerrigan could be constitutionally sentenced to two separate terms of imprisonment."

*Id.* at 49.

Unlike *Kerrigan*, this case presents a clear example of two indictments which, because of imprecise draftsmanship, fail to rule out the existence of a single continuing



conspiracy. The indictments are virtually identical, differing only in that they purport to charge bid-rigging with respect to different Kansas highway projects. The first indictment, however, also refers to the discussion of additional projects not specified in the indictment. The Government's "Statement of Facts in Support of Pleas," which was attached to the plea agreements in this case, further reveals that these additional projects were not all let on the same date.[6] Neither of the indictments eliminates the possibilities that the overt act of bid rigging alleged in the second indictment fell within the scope of the conspiracy charged in the first. The indictments give no indication of when either conspiracy ended, thereby implying an overlap in time; and they refer to "known and unknown" individuals, thereby implying an overlap of participants.

These features raise a presumption that the two indictments concerned a single conspiracy. *See United States v. Novak*, 715 F.2d 810, 818 (3d Cir. 1983) (citing *United States v. Mallah*, 503 F.2d 971, 985-87 (2d Cir. 1974)), *cert. denied*, 104 S. Ct. 1293 (1984). "[I]t is the government which has control over the drafting of indictments. Any burden imposed by the imprecision in the description of separate offenses should be borne by it." *United States v. Inmon*, 568 F.2d 326, 332 (3d Cir. 1977).

> "Blanket charges of 'continuing' conspiracy with named defendants and with 'other persons to the grand jurors unknown' fulfil a useful purpose in the prosecution of crime, but they must not be used in

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[6] Although not technically part of the indictment, this statement was on record when defendant's pleas were accepted and it presumably reflects the Government's account of what was to be admitted through their pleas. In any event, the indictment must not be read as referring to a single bid-letting date or it would follow that the Government chose the indictment's language in a deliberate attempt to misstate the facts.

such a way as to contravene constitutional guaranties. If the government sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred, and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first. . . . The constitutional provision against double jeopardy is a matter of substance and may not be thus nullified by the mere forms of criminal pleading."

*Short v. United States*, 91 F.2d 614, 624 (4th Cir. 1937); *see also United States v. Abbamonte*, 759 F.2d 1065, 1070 (2d Cir. 1985).

Given the vaguenes of the indictments, defendants could not and did not admit the existence of separate conspiracies merely by pleading to the facts alleged.[7] They are therefore not barred from establishing the existence of one continuing conspiracy. While the majority agrees with this

[7] I do not dispute that a defendant is bound by that to which he pleads and by whatever he states in open court as the basis for his plea. In my view, however, a defendant remains free to offer evidence in support of a surviving double jeopardy claim which does not contradict these admitted facts. *See Menna*, 423 U.S. at 62-63 n.2; *see also Abney v. United States*, 431 U.S. 651, 659 (1977).



view of the indictments, it would remand for an initial determination of the factual question. I submit, however, that the issue has already been resolved. In *United States v. Beachner Construction Co.*, 729 F.2d 1278 (10th Cir. 1984), this court upheld the factual finding of a single continuing conspiracy to rig bids within the Kansas asphalt industry. After this finding was made but before it was affirmed, the Government in this case stipulated that the record in *Beachner* could be considered in deciding defendant's Rule 35 motion. I read the stipulation as conceding, apart from the issues of waiver and forfeiture, that the factual circumstances presented here are indistinguishable from those in *Beachner* with respect to the existence of a double jeopardy violation.

Even Judge Barrett agrees that the district court's factual determination in *Beachner* should control future cases involving the Kansas asphalt industry:

> "[F]ollowing the filing of that opinion, all subsequent prosecutions in the District of Kansas or elsewhere in this circuit involving the identical factual bid-rigging scenario would be controlled by our holding in *Beachner*: that the scheme constituted a single, ongoing, continuous conspiracy."

Barrett Dissent at 12-13. The Government has received a full and fair opportunity to litigate this ultimate issue of fact. I see no reason why the *Beachner* findings should not be accorded full preclusive effect in this proceeding. Thus on remand the trial court could not now find that defendants were involved in more than one bid-rigging conspiracy. Because of the unusual relationship between this case and *Beachner*, I would vacate the conviction and sentences in No. 83-2558.

Nos. 83-2558 and 83-2559

UNITED STATES OF AMERICA

*v.*

RAY C. BROCE, ET AL.

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BARRETT, Circuit Judge, dissenting:

Judge O'Connor, in my view, correctly denied relief to the *Broce* defendants pursuant to Fed. R. Crim. P. 35(a) which provides that "[T]he court may correct an *illegal* sentence at any time and may correct a sentence imposed in an *illegal* manner within the time provided herein for the reduction of sentence." (Emphasis supplied.) At the time the guilty pleas were voluntarily entered in *Broce*, the *Beachner* opinion had not been filed. In fact, *Beachner* did not come down for more than two years after the *Broce* pleas were entered. There was, then, absolutely nothing *facially illegal* about the two indictments to which *Broce* pled guilty. They charged separate, independent conspiratorial acts in violation of the antitrust laws. There had been no judicial precedent *at that time* finding, as a *matter of fact*, that the separate "rigged" highway bids were other than separate conspiracies. Although the parties stipulated that Judge O'Connor "may consider the record made in the evidentiary hearing on the Motion to Dismiss [in *Beachner*] . . . in ruling on the merits of defendants' Motion to Vacate Sentence Pursuant to Rule 35(a) . . . " (R., Vol. I, p. 97), the district court was not required to apply *Beachner* retroactively. Judge O'Connor did, however, consider the *Beachner* record.[1]

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[1] The panel of this court that handed down *United States v. Beachner Const. Co., Inc.*, 729 F.2d 1278 (10th Cir. 1984) (*Beachner*), consisted of then Chief Judge Seth, O'Connor, Chief Judge, United States District Court for the District of Kansas, and Barrett, Circuit Judge, who authored the opinion. We there held in a case involving *the same and identical factual scenario as that before us here* that Judge Saffels *was not clearly erroneous* in concluding that because a common objective was shared by each participating contractor as a single, common and continuous scheme, the record supported the trial court's finding of a single conspiracy.

In the original panel *Broce* opinion reported as *United States v. Broce*, 753 F.2d 811 (10th Cir. 1985), it is interesting to note that Judge O'Connor was the trial judge whose order denied the Rule 35 motion to vacate guilty pleas to a second indictment charging separate bid-rigging conspiracies. On appeal Judge Seth dissented from the holding that *Broce* had been subjected to double jeopardy by pleading guilty to two indictments charging conspiracy to violate the antitrust laws.



The facts of this case are not in dispute. The *Broce* defendants were initially charged on *November 7, 1981*, by a two-count indictment for violations of the federal antitrust laws (15 U.S.C. § 1) and the mail fraud statute (18 U.S.C. § 1341) in relation to a specific Kansas highway construction project. Thereafter, on *February 4, 1982*, the *Broce* defendants were charged in a second indictment with a one-count violation of the federal antitrust laws in relation to a separate, distinct Kansas highway construction project. On *February 8, 1982*, pursuant to a plea bargain agreement the *Broce* defendants entered guilty pleas to the charges contained in both indictments. The trial court, prior to sentencing, conducted a detailed, thorough Rule 11 proceeding. There is no contention that the *Broce* defendants were represented other than by competent counsel or that the district court did not meticulously conduct the Rule 11 proceeding. Sentences were entered *March 15, 1982*. The *Broce* defendants file their Motion to Vacate Sentence on the ground that their sentences were in violation of the double jeopardy clause on *February 22, 1983*. *Id.* at 34.

I deem the trial court's reasoning in denying the *Broce* defendants Rule 35(a) relief as set forth in the court's Memorandum and Order important in our determination of the issue. Thus, I quote therefrom:

> The defendants' recent double jeopardy claim was inspired by the January 31, 1983 Memorandum and Order by Judge Dale E. Saffels of this court, in

another case involving bid-rigging in Kansas highway construction projects, *United States v. Beachner Construction Co., Inc., et al.*, No. 82-20076-01. Beachner Construction Co., Inc., was indicted on February 4, 1982, for a violation of the Sherman Antitrust Act and a mail fraud violation. Both charges related to a Kansas highway project let by the state of Kansas on Feburary 7, 1980. Robert Beachner was subsequently indicted for the same alleged offenses. The case proceeded to trial on May 3, 1982 ("*Beachner I*"). By a verdict rendered on May 7, 1982, a jury acquitted both defendants of the conspiracy and mail fraud charges.

On November 16, 1982, another indictment was returned by the grand jury, naming Beachner Construction Co., Inc., and Jerry Beachner as defendants. This indictment ("*Beachner II*") contained three counts alleging violations of §1 of the Sherman Act, and three counts alleging mail fraud violations. Judge Saffels found the *Beachner I* and *Beachner II* indictments to be identical, with the exception that *Beachner II* named Jerry Beachner rather than Robert Beachner, and that *Beachner II* specified three different highway projects.

In *Beachner II*, Beachner Construction Co., Inc., moved to dismiss the November 16, 1982 indictment, alleging *inter alia* double jeopardy and collateral estoppel. Following an evidentiary hearing, the court entered its January 31, 1983 Memorandum and Order, in which it concluded that the conspiracies charged in *Beachner I* and *Beachner II* were merely separate parts of a single larger and ongoing bid-rigging conspiracy that had been continuing for several years. Accordingly, Judge Saffels granted Beachner Construction Co., Inc.'s motion to dismiss.



**Discussion**

The defendants in the instant case, Broce Construction Co., Inc., and Ray C. Broce, contend that in light of Judge Saffels' decision in *Beachner II*, the judgment and sentence in Case No. 82-20011-01 constitutes a violation of the double jeopardy clause because it sentenced the defendants on two separate highway projects, as separate conspiracies, although they were both part of a single overall conspiracy to rig bids on Kansas highway construction projects. In addition, Broce Construction Co., Inc., contends that the total of 1.5 million dollars in fines imposed by the court was illegal because it exceeded the legal penalty of one million dollars per violation, as prescribed by 15 U.S.C. §1.

The defendants contend that in light of Judge Saffels' *Beachner II* ruling, they were guilty of only one bid-rigging offense—a single conspiracy—rather than two. The defendants thus allege that the sentence imposed by the court violates the double jeopardy clause on the ground of multiplicity in that it punishes them twice for a single offense.

It is certainly clear that the double jeopardy clause does protect a defendant against multiplicity of punishment. In *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), the Court stated:

> That guarantee [against double jeopardy] has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. *And it protects against multiple punishments for the same offense* . . . .
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> (Footnotes omitted) (emphasis added).

The defendants thus contend that they should be entitled to take advantage of Judge Saffels' *Beachner II* ruling because a Rule 35(a) motion can be raised "at any time." Although it is the general rule that a Rule 35(a) motion can be raised at any time [*Heflin v. United States*, 358 U.S. 415 (1959); *United States v. Golay*, 560 F.2d 866, 870 (8th Cir. 1977)], the government argues that the defendants waived their double jeopardy claim because it was not timely raised and because the defendants pleaded guilty to two separate conspiracies. The issue in the case is therefore whether a plea of guilty to counts alleging two separate conspiracies constitutes a waiver of a claim of double jeopardy on the ground that the defendants are being subjected to multiple punishment for a single offense.

* * *

In *Menna*, even though the defendant's guilty plea admitted the facts of his offense, the indictment—*on its face*—arguably violated the double jeopardy clause by charging him a second time for the conduct that was the subject of his previous contempt conviction. Thus, the defendant's double jeopardy claim was not rendered irrelevant by his guilty plea because the indictment *on its face* sought to punish the same conduct, thereby giving rise to a possible double jeopardy violation. In contrast, the challenged second indictment in the instant case (No. 82-20011-01) does not *on its face* seek to punish the defendants for the same conduct for which they were charged in the previous indictment (No. 81-20119-01). *Menna* left unanswered the question of whether a plea of guilty to one or more counts not multiplicious on their face constitutes a waiver of a claim of double jeopardy.



Our research reveals that few courts have squarely confronted this question left unanswered by the Supreme Court in *Menna*. Although the defendants have cited two broadly-worded opinions for the proposition that a guilty plea does not constitute a waiver of a double jeopardy claim, *United States v. Broussard*, 645 F.2d 504 (5th Cir. 1981); *Launius v. United States*, 575 F.2d 770 (9th Cir. 1978), neither of these cases involved a plea of guilty to an indictment or information that was not multiplicious on its face. In other words, the cases cited by the defendants are entirely within the scope of the rule announced in *Menna*.

The defendants point out that there is broad language in the *Launius* opinion to the effect that a waiver of a double jeopardy claim must be a " 'waiver' as defined in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)—the intentional relinquishment or abandonment of a known right or privilege." 575 F.2d at 772. The government, in response, has cited to a line of cases in the Eighth and Second Circuits to the effect that a claim of double jeopardy is non-jurisdictional and is waived if not timely and affirmatively pleaded. *United States v. Herzog*, 644 F.2d 713, 716 (8th Cir. 1981); *McClain v. Brown*, 587 F.2d 389, 391 (8th Cir. 1978); *United States v. Perez*, 565 F.2d 1227, 1232 (2d Cir. 1977). The Tenth Circuit apparently had not addressed the question of waiver of a double jeopardy claim. We are not convinced, however, that the waiver theories announced in either *Launius* or the *Herzog* line of cases should be applied to the facts of the instant case.

We believe that the resolution of the pending motion should be controlled by the opinion in *Kerrigan v. United States*, 644 F.2d 47 (1st Cir. 1981), which

more closely resembles the facts and the resulting legal issues of the matter at bar than does any other case cited by the parties or uncovered by the court's research. Kerrigan was indicted in two separate indictments by a federal grand jury. The first indictment charged that Kerrigan conspired with others, between August 25, 1977, and September 1, 1977, to transport and to sell stolen lithographs. The second indictment charged that Kerrigan conspired with one of his previous co-conspirators, between September 1, 1977, and September 22, 1977, to transport and to sell stolen Indian jewelry. The second indictment also charged Kerrigan with a substantive count of transporting the stolen jewelry in interstate commerce. Kerrigan pleaded guilty to the two conspiracy charges, each before a different judge, and in exchange the government dismissed the substantive count. On March 15, 1978, Kerrigan was sentenced to three years for the jewelry conspiracy and two years (consecutively) for the lithograph conspiracy. After his sentencing, Kerrigan challenged the two-year sentence on the ground that the two charges involved parts of a single conspiracy. The district court adopted the magistrate's finding that the indictments charged separate conspiracies, and rejected Kerrigan's challenge to his sentence.

On appeal, Kerrigan again asserted that there was only one conspiracy and argued, relying on *Menna* and *Launius*, that his guilty plea did not waive his right to raise the double jeopardy claim. In the opinion for the First Circuit, Judge Campbell discussed *Menna* and *Launius* at some length.

> *Menna* and *Launius* do indeed indicate that a double jeopardy claim may lie notwithstanding a guilty plea, but in neither case did the double jeopardy claim depend upon a repudiation of the



> allegations in the indictment to which the plea had been entered. These cases do not hold, as Kerrigan suggests, that a defendant who pleaded guilty may later contest the factual and theoretical foundations of the indictment to which he pleaded, so as to show that, in fact, he committed only a single offense. The court in *Launius* explicitly and correctly stated that "By pleading guilty appellants admitted the facts alleged in the information." [Citations omitted]. Kerrigan's claim of double jeopardy must be evaluated under the version of facts stated in the indictment, not against an alternative version of events which Kerrigan now claims is more accurate. Evaluated in this way, Kerrigan's claim is quite different from that asserted in *Launius*; far from being facially multiplicitous, as in *Launius*, Kerrigan's indictments sufficiently described two separate and distinct offenses, for which Kerrigan could be constitutionally sentenced to two separate terms of imprisonment.
>
> 644 F.2d at 49.

Judge Campbell concluded that:

> the two agreements charged related to commission of crimes which were similar but distinct. Thus, facially, it is possible to have had two conspiracies. . . . By pleading guilty, Kerrigan accepted the government's two-conspiracy allegations, and it is too late for him to try to establish something else. The factual allegations of the indictments sufficiently charge two separate conspiracies; Kerrigan is bound by these facts because of his guilty pleas; and Kerrigan has therefore not been twice placed in jeopardy for the same offense.
>
> *Id.*

The similarity between the facts of the case now at bar and those of *Kerrigan* is inescapable. Defendants Ray C. Broce and Broce Construction Co., Inc., pleaded guilty to two separate indictments alleging different conspiracies beginning at different times (more than one year apart) and involving different construction projects. On their faces, the indictments alleged two distinct criminal conspiracies, and the defendants pleaded guilty to each, acknowledging the validity of the facts contained in each indictment. Accordingly, we feel compelled to adopt the First Circuit's reasoning that the defendants "accepted the government's two-conspiracy allegations, and it is too late for [them] to try to establish something else." 644 F.2d at 49.

There remains, however, the defendants' suggestion that, notwithstanding their pleas of guilty, Judge Saffels' subsequent ruling in *Beachner II*, that there was only one agreement among Kansas contractors to rig bids, rendered their sentences invalid and that it now "appears from the face of the indictments that but one conspiracy existed for which defendants have been twice punished." (Defendant's Reply, at 9.) In support of this theory that an intervening court decision can merge the contents of previous indictments alleging two conspiracies into a single conspiracy, the defendants cite *Smith v. United States*, 287 F.2d 270 (9th Cir. 1961).

In *Smith*, the defendant pleaded guilty to a three-count information arising out of a bank robbery. Each count charged the defendant with violating a different subsection of 18 U.S.C. §2113. After the defendant was sentenced, the



Supreme Court of the United States, in another case, held that the subdivisions of 18 U.S.C. §2113 charged but one offense and that the imposition of more than one sentence was illegal. As a result, the defendant's sentence was corrected.

We are not persuaded that this line of reasoning is applicable here. *Smith v. United States* is distinguishable from the situation at bar in that the intervening decision in that case involved a question of *law*: the operation of a statute. Consequently, the Supreme Court's decision was applicable to Smith's case. Judge Saffels' finding of a single conspiracy in *Beachner II*, however, was a factual determination made in light of the evidence produced at an evidentiary hearing in that particular case. It is well settled that the question whether a single conspiracy or multiple conspiracies exist is a question of fact. *United States v. Elam*, 678 F.2d 1234, 1245 (5th Cir. 1982); *United States v. James*, 576 F.2d 1121, 1126 (5th Cir. 1978); *United States v. Armedo-Sarmiento*, 545 F.2d 785, 789 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977); *United States v. Ippolito*, 509 F.Supp. 1205, 1208 (E.D. N.Y. 1981). Accordingly, we do not believe that at this late date the defendants should be permitted to take advantage of a factual determination that is inconsistent with the facts the defendants admitted in pleading guilty to the indictments alleging two separate conspiracies.

We do not agree with the defendants' allegation that "[t]he position of the government would effectively deprive any defendant who pleads guilty of the right to file a Rule 3[5] motion which specifically preserves this right to those

> who plead guilty." (Defendants' Reply, at 10.) We hold merely that where a defendant by pleading guilty admits facts that do not give rise to a double jeopardy claim, he will not later be permitted to raise a double jeopardy claim that depends upon a version of the facts different from that he has admitted.

(R., Vol. II, pp. 281-90.) It is apparent from the above-quoted excerpt of Judge O'Connor's Memorandum and Order that he carefully considered the record in *Beachner* yet properly denied the *Broce* defendants relief because they had pled guilty to facially legal indictments, their pleas admitted the factual basis of the charges, and *Beachner* did not control this case.

I.

**Menna and Blackledge**

The trial court, unlike the majority, found that *Menna v. New York*, 423 U.S. 61 (1975) was not applicable here. By analogy, the same rationale would apply to *Blackledge v. Perry*, 417 U.S. 21 (1974), which case was not addressed by the trial court. I agree with the trial court's analysis. Thus, I conclude that *Menna* and *Blackledge* do not apply to the case at bar.

Significantly, in both *Menna* and *Blackledge*, the double jeopardy challenge was posited (like *Beachner*) prior to trial. I recognize that this is not always conclusive, but it weighs heavily here. It was not of significance in *Menna* because plainly—without the need of an evidentiary hearing—*Menna* had been twice placed in jeopardy: Menna had initially been incarcerated on a contempt charge *for refusal to obey a court order to appear and testify before the grand jury*. Thereafter, following denial of his motion to dismiss the indictment *for refusal to answer questions before the same grand jury,* he entered a guilty plea thereto and was sentenced. The Supreme Court logically



held that Menna's earlier conviction for contempt was a criminal conviction "*for the same crime as the one charged in the instant indictment.*" 423 U.S. at 62, n. 1 (emphasis supplied). *No evidentiary hearing involving the fact-finding process was required to arrive at that logical conclusion.*

In *Blackledge v. Perry*, 417 U.S. 21 (1974), again there was no fact-finding evidentiary hearing required in order for the Supreme Court to conclude that after *Blackledge* had been charged, tried and convicted by the state authorities on a *misdemeanor* charge that he could not subsequently be charged, tried and convicted by those same state authorities on a *felony* charge involving *the identical facts and circumstances.* The Supreme Court held that the felony charge was lodged against Blackledge in retaliation to his filing of a petition for trial *de novo* of his misdemeanor conviction, constituting a deprivation of due process of law. Neither *Menna* nor *Blackledge* involve the rule at the heart of the case at bar: absent a statutory impediment (i.e., lack of subject matter jurisdiction) or a Due Process deprivation (i.e., filing a subsequent charge in retaliation to a defendant taking appeal from an earlier conviction), the rule in this circuit has long been—and continues to be after *Menna* and *Blackledge*—that an accused *waives* his claim of double jeopardy to a subsequent criminal charge if the crimes charged, *on their faces*, are separate and distinct and if the evidence necessary to establish guilt as to one charge differs from that necessary to establish guilt as to another. In such case, we have held that the right not to be placed in jeopardy twice for the offense is a personal right which may be waived by a guilty plea. *Caballero v. Hudspeth*, 114 F.2d 545 (10th Cir. 1940); *Cox v. Crouse*, 376 F.2d 824 (10th Cir. 1967); *Cox v. State of Kansas*, 456 F.2d 1279 (10th Cir. 1972); *United States v. Rich*, 589 F.2d 1025 (10th Cir. 1978); 24 ALR 4th 1313.

These cases are consistent with Judge O'Connor's reliance on *Kerrigan v. United States*, 644 F.2d 47 (1st Cir. 1981). This is the *only* case, in the course of our research, which closely fits the niche of the facts of the instant case. Kerrigan pled guilty and was sentenced under two indictments, both of which charged him with conspiracy to transport stolen goods in interstate commerce. Thereafter, Kerrigan brought a habeas corpus action contending that his sentence should be vacated on the ground that it violated his Fifth Amendment rights not to be twice placed in jeopardy for the same offense. The court of appeals affirmed the district court's denial of relief and pertinently observed:

> *Menna* and *Launius* do indeed indicate that a double jeopardy claim may lie notwithstanding a guilty plea, but in neither case did the double jeopardy claim depend upon a repudiation of the allegations in the indictment to which the plea had been entered. These cases do not hold, as Kerrigan suggests, that a defendant who pleaded guilty may later contest the factual and theoretical foundations of the indictment to which he pleaded, so as to show that, in fact, he committed only a single conspiracy. The court in *Launius* explicitly and correctly stated that "By pleading guilty the appellants admitted the facts alleged in the information." *Brady v. United States*, 397 U.S. 742, 748 . . . (1970); *Willard v. United States*, 445 F.2d 814, 816 (7th Cir. 1971). *Kerrigan's claim of double jeopardy must be evaluated under the version of facts stated in the indictment, not against an alternative version of events which Kerrigan now claims is more accurate. Evaluated in this way, Kerrigan's claim is quite different from that asserted in Launius; far from being facially multiplicitious, as in Launius, Kerrigan's indictments sufficiently describe two separate and distinct offenses, for which Kerrigan could be constitutionally sentenced to two separate terms of imprisonment.*



644 F.2d at 49 (emphasis supplied).

Consistent with the logic of *Kerrigan*, it is my view that the *only* effect that can be firmly placed on *Beachner* is that *following the filing of that opinion, all subsequent* prosecutions in the District of Kansas or elsewhere in this circuit involving the identical factual bid-rigging scenario would be controlled by our holding in *Beachner*: that the scheme constituted a single, on-going, continuous conspiracy. To that extent and only to that extent the Government should be collaterally estopped from relitigating the precise, identical issue in subsequent criminal prosecutions. This is simply the application of the principle of issue preclusion. *See, Bullock v. Pearson*, No. 84-1830 (10th Cir., July 26, 1985). Thus, there is no analogy between *Broce* and the double jeopardy bar found in *Blackledge* based upon a due process deprivation of a fundamental nature.

The majority opinion does, as the Government contends, (a) encourage defendants to challenge their sentences long after their guilty pleas are entered, effectively undermining the effectiveness of the criminal justice system and the finality of convictions, and (b) discourage federal prosecutors from entering into plea bargaining with all advantages cast on the side of the defendant and the government realistically inviting deprivation of its benefits under the plea bargain.

The analogy between the instant case and *Kerrigan*, in the double jeopardy context, is strikingly clear: Evaluating the allegations in the indictment *both* from a factual viewpoint and applicable law *existing at the time of the Broce plea*, the double jeopardy claim must fail. Notwithstanding Judge Saffels' finding of fact in *Beachner* that the various highway contractors entered into a single, ongoing conspiracy to rig highway construction bids, this *was not* a

binding rule of law when the *Broce* pleas were entered, voluntarily and upon advice of competent counsel. This court did not affirm Judge Saffels' *Beachner* finding/conclusion (single versus multiple conspiracies) *until more than two years after the Broce guilty pleas* had been entered admitting the facts alleged, i.e., that each separate highway bid rigged contract constituted a *separate, single,* conspiracy.

*Caballero v. Hudspeth, supra,* was an appeal from the district court's denial of habeas corpus relief. We there held on appeal, that the defendant's guilty plea to a two count indictment involving violation of the White Slave Act was improper (but not invalid) because the emphasis of the statute is on the interstate transportation and in this case there was but *one trip*, and that the one transportation involved but one offense. The defendant had been charged and pled guilty to two counts involving transportation of one Elise Herbert: one count charged that the defendant intended to compel her to engage in prostitution; the second count charged that the defendant intended to unlawfully cohabit with her. This court held, however, that the charges were *facially* valid and that the defendant was not subjected to double jeopardy because he entered the guilty plea voluntarily, while represented by competent counsel, and did not object to the charges at any stage of the proceeding. Under these circumstances, we held that the right not to be placed in jeopardy twice is a personal right which may be waived by a plea of guilty.

In *Cox v. State of Kansas, supra*, Cox, a state prisoner, appealed a district court denial of his petition for federal habeas corpus relief. Cox had been convicted, following his guilty plea in 1966, to a charge of second degree kidnapping. Cox relied on *Benton v. Maryland*, 395 U.S. 784 (1969). There, Benton had been tried in a Maryland state court for burglary and larceny. He was acquitted of larceny but found guilty of burglary. Because the jury had



been selected under the invalid Maryland constitutional provision, Benton was given the option of demanding re-indictment and retrial. He was re-indicted for both larceny and burglary. *Prior to retrial*, Benton moved to dismiss the larceny charge on the ground of double jeopardy. The motion was denied and Benton was subsequently convicted of both larceny and burglary. The Supreme Court struck down the larceny conviction because of his acquittal of this charge in the first trial. *There was no contention made that the charges (larceny and burglary) were facially invalid and other than separate, distinct offenses.* Cox, unlike Benton, *did not challenge the indictment prior to trial.* In denying Cox federal habeas relief this court quoted *Brady v. United States*, 397 U.S. 742, 757 (1970): "[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise."

*Menna* discloses the double jeopardy bar *on the face* of the charges involved. *Blackledge* discloses a prosecutorial intent to deny Blackledge due process of law by initiating *felony* proceedings arising out of the same acts and circumstances as those involving a *misdemeanor* conviction he was appealing. The due process deprivation was that of retaliation for Blackledge's appeal from the misdemeanor conviction. Neither case, I submit, involved the situation presented here: the *Broce* pleas were to charges contained in indictments alleging separate, distinct conspiracies *on their face*; there was no statutory impediment creating lack of subject matter jurisdiction; there was no substantive due process violation by the prosecution; and there were no judicial opinions then in being and controlling dictating that the indictments to which Broce pled guilty were duplicitous. Judge Seth, in his *Broce* dissent, logically dissected *Menna*:

> Virtually all the courts of appeal since *Menna* have continued to hold that the defense is waived if not

raised in some way before trial *as it was in Menna.* This is a perfectly reasonable construction of *Menna* where the defense was so raised. The Court in *Menna* stated that a plea of guilty "removes the issue of factual guilt from the case." The Court also there stated:

> We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute.

*The indictments in the case before us do on their faces allege separate offenses.* By the guilty pleas the defendants admitted the recitations in the indictments, and these are the facts to be used in evaluating the double jeopardy claims. *Kerrigan v. United States,* 644 F.2d 47 (1st Cir. 1981). These facts recite separate offenses.

The case which upholds appellants' position that *Menna* precludes waiver, and it may be the only case, is *Launius v. United States,* 575 F.2d 770 (9th Cir. 1978). The post-*Menna* cases with contrary holdings (or which consider situations where the defense was raised at or before trial and so hold no waiver) include: *United States v. Pratt,* 657 F.2d 218 (8th Cir. 1981); *United States v. Broussard,* 645 F.2d 504 (5th Cir. 1981); *United States v. Gaertner,* 583 F.2d 308 (7th Cir. 1978); *United States v. Inmon,* 568 F.2d 326 (3rd. Cir.1977); *United States v. Wild,* 551 F.2d 418 (D.C. Cir. 1977) . . . .

753 F.2d 811, 824 (10th Cir. 1985) (emphasis at the end of the first paragraph supplied).



**II.**

**The Waiver Issue**

The majority opinion, in reliance on *Menna* and *Blackledge,* seems to paint a broad-swath rule that a double jeopardy claim cannot be waived. Those cases do not and cannot stand for such a broad rule. In both *Menna* and *Blackledge* the Court was dealing with obvious *jurisdictional* problems: the very power to prosecute a second time.

*Broce* does not present a jurisdictional problem. Thus, our well-recognized rule that a claim of double jeopardy is a personal right which may be waived is fully applicable. *Broce,* just as *Beachner,* presented a factual issue as to whether the conspiracies charged in the separate indictments arose out of *one* continuous, ongoing scheme (and thus one conspiracy) or separate, distinct conspiracies. There is nothing unique in challenges to such indictments under the Double Jeopardy Clause. In making such determinations, the issue presented is *one of fact* for the court or jury. *United States v. Dickey,* 736 F.2d 571, 581 (10th Cir.), *cert. denied,* 105 S.Ct. 957 (1984); *United States v. Beachner Const. Co., Inc., supra; United States v. Watson,* 594 F.2d 1330, 1340 (10th Cir.), *cert. denied,* 444 U.S. 840 (1979); *United States v. Petersen,* 611 F.2d 1313, 1327 (10th Cir. 1979), *cert. denied,* 447 U.S. 905 (1980).

In *Dickey, supra,* the prosecution charged a single, ongoing conspiracy among the defendants involving possession and distribution of drugs for profit. On appeal the defendants urged that the *evidence was insufficient* to prove one conspiracy and that it disclosed multiple conspiracies. Thus, the contention was that reversal was required on the ground of variance between the charge and the evidence. This court affirmed the jury's fact-finding of a single, ongoing conspiracy under the clearly erroneous rule. In *United States v. Hines,* 728 F.2d 421 (10th Cir.),

*cert. denied*, 104 S.Ct. 3523 (1984), we held, in the same vein as the *Blackledge* Court, that various counts of the indictment charging the defendant with breaking and entering a Post Office with intent to commit larceny and steal separate matters (as charged) such as letters containing credit cards, checks, etc., were not multiplicious because the statutes enacted by the Congress made each taking a separate crime and that each required proof of facts which were not required of the other. And in *United States v. DuFriend*, 691 F.2d 948 (10th Cir. 1982), *cert. denied*, 459 U.S. 1173 (1983), we held that there was no inherent double jeopardy problem raised by defendant's conviction of *both* conspiracy to possess marijuana and conspiracy to possess marijuana with intent to distribute, relying on *Albernaz v. United States*, 450 U.S. 333 (1981) for the proposition that "[T]here clearly is no inherent double jeopardy problem raised by appellant's convictions for both conspiracy to import and conspiracy to distribute marijuana." 691 F.2d at 952.

Rule 12(b)(2), Fed. R. Crim. P. requires that a complaint about the multiplicity of an indictment and its inherent double jeopardy problems must be raised before trial. Any defense, objection or request that is capable of determination without a trial of the general issue may be raised before trial by motion. Wright, *Federal Practice and Procedure: Criminal 2d*, § 193, pp. 692-93. Nothing in *Menna* or *Blackledge* dilutes compliance with this rule *if* the charges to which the defendant pled guilty or was convicted were *valid on their face*, that is: at the time of the plea, the separate charges were not subject to the impediment of lack of subject matter jurisdiction or brought in retaliation or some other deprivation of a due process right of the defendant.

It is important to recall that the *Broce* pleas of guilty were entered on *February 8, 1982*. Judge Saffels entered his order finding a single conspiracy in *Beachner* following



a second indictment filed on *November 16, 1982*, some *nine months* after the *Broce* pleas had been entered. Our *Beachner* opinion was not filed until *March 22, 1984*. Beachner did, as previously noted, preserve the double jeopardy challenge by virtue of a pre-trial Rule 12(b)(2) motion, which generated the pre-trial evidentiary hearing conducted by Judge Saffels leading to the court's finding that only one conspiracy existed involving the Kansas highway construction bid-rigging scheme. In addition to Rule 12(b)(2), it is to be noted that the *Broce* defendants could have availed themselves of Rule 11(b), Fed. R. Crim. P. by entering a conditional plea of guilty manifesting a knowledgeable admission of the facts contained in the indictments, while perserving the issue of double jeopardy. *United States v. Moskow*, 588 F.2d 882 (3rd Cir. 1978); *United States v. Zudick*, 523 F.2d 848 (3rd Cir. 1975); 33 ALR Fed. 385.

The record before us shows conclusively that the trial court meticulously met all of the requirements of Rule 11 for acceptance of the *Broce* pleas, including full and complete advisement of the nature of the charges, the length of possible incarceration and other punishment, and advisement that the court was not bound by the plea agreement. The court established the existence of a factual basis for the pleas, the competency of the defendants to plead, the assistance of competent counsel, the voluntariness of the pleas based on the plea agreement, and the defendants' complete understanding of the consequences of the guilty pleas. (R., Vol. II, pp. 102-91.) The court also fully complied with the *ABA Standards*, Pleas of Guilty § 1.4. *Menna* recognizes that a counseled guilty plea validly removes the issue of factual guilt from the case. I conclude that the *Broce* defendants effectively waived their right to collaterally attack their guilty pleas by virtue of their failure to raise the double jeopardy challenge pursuant to

Rule 12(b)(2) or Rule 11(b). This, in my view, is precisely the type of case the Supreme Court made reference to in *Menna* when it opined that its holding was not to be considered as one which closed the door to a waiver of a double jeopardy claim by virtue of *all* guilty pleas. 423 U.S. at 63 n.2.

I turn now to the Rule 35, Fed. Rules Crim. P. motion filed by *Broce* and denied by the district court. That rule provides, *inter-alia*: The court "may correct an *illegal* sentence at any time and may correct a sentence imposed in an *illegal* manner within the time provided herein for the reduction of sentence." Note that an *illegal sentence* may be corrected at any time. *Menna* and *Blackledge* clearly fall in that category. *Broce*, on the other hand, does not. A sentence is illegal under Rule 35 if it is in excess of the statute under which the charge is lodged, or in some other manner violative of an applicable statute. Simply stated, such a sentence is one that the judgment of conviction *does not authorize. United States v. Morgan*, 346 U.S. 502 (1954). Thus, in *Heflin v. United States*, 358 U.S. 415 (1959) the Supreme Court upheld relief afforded under Rule 35 to correct an illegal sentence. The Court set aside separate sentences imposed under 18 U.S.C. § 2113(e) involving a bank robbery. The Court set aside the sentence on the count which charged that the defendant received stolen property, holding that the subsection of the statute relied on by the Government was not designed to punish one who robs a bank, but rather one who receives the loot from the robber. Thus, unlike *Broce*, the charge was deficient for lack of subject matter jurisdiction. No fact finding process was involved. In like manner, the Court in *Prince v. United States*, 352 U.S. 322 (1957) construed a statute and, as a matter of law, held that the crime of entry into a bank with intent to rob was not a crime separate and distinct from the offense of robbery proper. This case, too, involved the construction and interpretation of a statute leading to the legal conclusion that the sentence was illegal. Congressional ~~intent~~ was carefully considered. Again, the distinction between these cases and *Broce* and *Beachner* is clear.



In *Marteney v. United States*, 216 F.2d 760 (10th Cir. 1954), we held that a 28 U.S.C. § 2255 habeas proceeding should be treated as a motion to vacate sentence and proceeded to hold that it affirmatively appeared on the face of the challenged indictment that no federal offense was committed. We there clearly distinguished between indictments which, as a matter of law, do not, *on their face*, charge an offense and those which *do not* involve jurisdictional challenges:

> A plea of guilty to an indictment is an admission of all nonjurisdictional facts alleged in the charge, and when the judgment of sentence is collaterally attacked under Section 2255, the sentencing court, indulging in the presumption of regularity *will not disturb its judgment unless the indictment or information shows upon its face that no federal offense has been committed.* We have said that "The test of the sufficiency of the indictment on a motion to vacate a sentence is whether the indictment by any reasonable construction can be said to charge the offense for which the sentence was imposed." *Byers v. United States*, 10 Cir., 175 F.2d 654, 656. See also *Pulliam v. United States*, 10 Cir. 178 F.2d 777; *Kreuter v. United States*, 10 Cir., 201 F.2d 33. . . . If, however, it affirmatively appears on the face of the indictment or information that no federal offense was committed, the charge is vulnerable to collateral attack . . . [a]nd this is so even in the face of a guilty plea, for one cannot plead

> guilty to an offense which is not affirmatively stated in the charge.

216 F.2d at 762. *See also, United States v. Donohoe*, 458 F.2d 237 (10th Cir.), *cert. denied*, 409 U.S. 865 (1972) (a guilty plea waives all nonjurisdictional defenses); *United States v. Watkins*, 709 F.2d 475 (7th Cir. 1983) (an indictment not challenged before trial will be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant was convicted; however, an indictment which fails to state an offense is a fatal defect which may be raised at any time).

Judge Saffels, in *Beachner*, did not hold, as a matter of law, that there was any lack of subject matter jurisdiction, that the sentence beyond the scope of the statute or that the sentence was illegally imposed in violation of a statute. He set the *Beachner* sentence aside based upon, and exclusively upon, his *fact-finding determination* following a Rule 12 motion to dismiss, on the ground of double jeopardy. Following an evidentiary hearing held thereon, Judge Saffels found that there was a single, ongoing conspiracy instead of the separate, distinct conspiracies charged by the Government. There were no constitutional underpinnings involved in this finding. It was upheld by this court, on appeal, on the ground that it was not clearly erroneous.

I conclude that Judge O'Connor properly denied *Broce* Rule 35 relief.

### III.
### The Stipulation and the Disposition

The majority opinion may, by inadvertance, have imparted the view that the Stipulation entered into between the parties in this Rule 35 proceeding somehow bound Judge O'Connor to Judge Saffels' single, ongoing conspiracy finding in *Beachner*. Such is simply not the case. The Stipulation reads in full as follows:



> Comes now the parties and stipulate that the Court may consider the record made in the evidentiary hearing on the Motion to Dismiss filed by Beachner Construction Co., Inc. in *United States v. Beachner Construction Co., Inc., et al.*, Case No. 82-20076-01 in the United States District Court for the District of Kansas in ruling on the merits of defendants' Motion to Vacate Sentence Pursuant to Rule 35(a) in the instant case.

(R., Vol. I, p. 97.)

The court did consider the *Beachner* hearing record, as evidenced by Judge O'Connor's detailed references thereto. Nothing in the Stipulation provides that Judge O'Connor was bound by Judge Saffels' finding of a single conspiracy in *Beachner* in making his "ruling on the merits" on the Rule 35(a) motion. It is thus puzzling why the majority opinion (pages 10 and 11 of Slip Opinion) states:

> As previously indicated, the parties stipulated in the trial court that the transcript from the evidentiary hearing on the double jeopardy issue in *Beachner* would be incorporated in the record in this case. Thus, our opinion in *Beachner* must have weight here. . . .
>
> Whatever the approach taken in other cases in determining the nature of the charged conspiracy, the stipulation to include consideration of the *Beachner* transcript presents a unique case and permits us to go behind the indictment. Having conceded the applicability of the facts developed in that hearing, the government is not in the position to argue our examination of the issue must be confined to the pleadings. Can that stipulation by the government be regarded as anything but a concession on its part that

> the facts of the two cases are so interwined that one is relevant to the other in consideration of the same legal issue? We think not.

I submit that the question, as posed, implies that Judge Saffels' finding, following a Rule 12 Motion to Dismiss filed in *Beachner, based on all the facts presented at the hearing*, that a single, ongoing conspiracy, rather than multiple conspiracies was established, was binding on Judge O'Connor in the Rule 35 proceeding. That is not so.

First, even though the majority opinion *finds* that "on their face the two (*Broce*) indictments do not appear to charge different conspiracies" (Slip Opinion, p. 10), neither Judge Saffels, in *Beachner*, nor Judge O'Connor, in *Broce*, so found. Each found to the contrary. Indeed, if Judge Saffels had so found, in *Beachner*, there would have been no reason to conduct the evidentiary hearing on the Motion to Dismiss to determine the issue of the single conspiracy versus multiple conspiracies. In my view, Judge O'Connor was on target (and Judge Saffels obviously agreed) when he found that "on their faces, the indictments alleged two distinct criminal conspiracies, and the defendants pleaded guilty to each, acknowledging the validity of the facts contained in each indictment." (R., Vol. II, p. 288.)

Second, the Stipulation clearly states *only* that Judge O'Connor "may consider" the *Beachner* record made by Judge Saffels. That he did. To suggest that he was legally bound by Judge Saffels' finding is a distortion of the language of the Stipulation. I submit that Judge O'Connor would have considered the *Beachner* record regardless of the Stipulation because *Beachner* was the basis for the *Broce* Rule 35 motion. The *Beachner* record was in the same court presided over by Chief Judge O'Connor. A court may, *sua sponte*, take judicial notice of its own records and preceding records if called to the court's attention by the parties. *St. Louis Baptist Temple v.*



*F.D.I.C.*, 605 F.2d 1169 (10th Cir. 1979); *Ginsberg v. Thomas*, 170 F.2d 1 (10th Cir. 1948). Thus to remand this case to the district court for a "hearing" to look behind the indictments appears to be an attempt by the majority to advise the district court to *apply Beachner* retroactively when the district court has already considered its effect on this case.

Third, I submit that the *only* way that *Beachner* could have controlled *Broce* in the Rule 35 proceeding is *if Beachner* had been decided prior to the acceptance of the voluntary guilty pleas entered by the *Broce* defendants. Such, however, was not the case. The *Broce* guilty pleas were entered *prior* to the *Beachner* decision rendered by Judge Saffels on the Motion to Dismiss. Thus, in order for *Beachner* to control in the disposition of the *Broce* Rule 35 proceeding, *Beachner* must necessarily be applied retrospectively.

The majority opinion does not address the issue whether *Beachner* should apply retroactively so as to render the *Broce* pleas illegal. I conclude that this is an issue because of the broad sweep of the majority holding, which seems to be either that *all* guilty pleas are subject to collateral attack or that because of the Stipulation, Judge Saffels' finding of a single, ongoing conspiracy in *Beachner* controls in the remand to the district court. I fail to see why "the Stipulation to include consideration of the *Beachner* transcript presents a unique case and permits inquiry behind the indictment" (Slip Opinion, p. 11) if the majority does not implicitly hold *Beachner* should be applied retroactively to *Broce*. Judge O'Connor did consider *Beachner*. Thus, I must ask why Judge O'Connor's consideration of the record on remand should lead to a different result unless the majority intends that *Beachner* apply retroactively? Even if we assume *arquendo*, that the *Broce* defendants' guilty pleas did not waive their double jeopardy claim and the Stipulation to consider the

*Beachner* record permits the district court to look beyond the face of the indictments, why should the district court find differently on remand? *Beachner*, decided after *Broce*, does not render the *Broce* indictments duplicitous unless *Beachner* is applied retroactively. Absent a holding that the indictments are facially illegal, which I do not read the majority's opinion to so hold, (nor did Judge Saffels or Judge O'Connor find), I see no reason to remand.

Because there is no infirmity in the statutes under which *Broce* or *Beachner* were indicted and convicted or any other statutory infirmity involved, the only basis upon which *Beachner* can be applied retroactively to render the *Broce* pleas invalid under the double jeopardy clause is to do so in reliance on Judge Saffels' *finding of fact* which occurred subsequent to the *Broce* guilty pleas to *facially valid indictments*. This, I submit, is in violation of the Stipulation and the rule that a voluntary, counseled plea of guilty entered following full compliance with Rule 11 constitutes an admission of facts and all elements contained in the indictment. *McCarthy v. United States*, 394 U.S. 459 (1969); *Menna, supra* at n.2.

In *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971) the Supreme Court discussed the retroactive versus nonretroactive application of judicial decisions. Assuming, as I do here, that *Beachner* did announce the controlling rule applicable, i.e., that the highway bid rigging in Kansas was a single, ongoing conspiracy rather than separate conspiracies based upon the distinct contracts for each highway construction project, I do not believe that *Beachner* should be given retroactive application.

*Chevron Oil Company v. Huson* set forth the following test useful in determining the nonretroactive application of judicial decisions:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, . . . "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."



404 U.S. at 106-07 (citations omitted).

In applying the above test, I conclude: First, the *Beachner* decision did decide a factual issue of first impression whose resolution was not clearly foreshadowed, i.e., whether the highway bid-rigging contracts constitute a single, ongoing conspiracy or multiple, separate conspiracies. Second, the application of *Beachner*, based on the fact-finding process, has only a single purpose and effect and that is to control all prosecutions of highway bid-rigging contractors involved in the conspiratorial enterprise identified in *Beachner* pursued *after Beachner*. Third, it would be inequitable and unjust to void the *Broce* guilty pleas because the defendants were fully counseled and advised. The *Broce* defendants entered the guilty pleas to separate, distinct conspiracies and all parties, including Judge O'Connor, accepted the factual basis for the separate indictments; however, and in addition, the *Broce* pleas were predicated upon a *plea bargain agreement*. The fact that the guilty pleas in this case were entered pursuant to a plea bargain has a special significance. A plea agree-

ment involves *quid pro quo*. *United States v. Cross*, 638 F.2d 1375 (5th Cir. 1981). Here, the Government agreed not to charge or prosecute certain counts in exchange for the *Broce* guilty pleas. There is no challenge before us that the plea bargain was not handled by the court and counsel in full compliance with the guidelines set forth in Fed. R. Crim. P., Rule 11 (e). It is implicit that in accepting the *Broce* pleas, Judge O'Connor did not look upon the indictments as charging other than separate, distinct conspiracies. No challenge had been posited by the *Broce* defendants prior to entry of the pleas.

In *United States v. Allen*, 724 F.2d 1556 (11th Cir. 1984), following a plea bargain, the defendant pleaded guilty to four counts of an indictment and the Government dismissed thirteen counts. Thereafter, defendant collaterally attacked his conviction, on the ground that two counts he pleaded guilty to constituted only a single offense; the court held that the defendant had waived his right to contest the maximum sentence and particularly so in that he had benefitted from the dismissal of thirteen other charges and therefore could not "renege on his part of the bargain." *Id.* at 1558; *United States v. Solomon*, 726 F.2d 677 (11th Cir. 1984).

Generally, the doctrine of Double Jeopardy is that one may not be tried or prosecuted a second time for the same offense and it is essential that the second prosecution involve the same act and crime both in law and in fact. *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *United States v. Dinitz*, 424 U.S. 600, 606 (1976); *United States v. Wilson*, 420 U.S. 332, 343 (1975); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) (the Double Jeopardy Clause "prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense").

I respectfully submit that *Broce* was not subjected to the bar of Double Jeopardy. In an evidentiary sense, the Double Jeopardy Clause comes into play as "to preclude retrial after reversal of a conviction only when the appellate court has set aside the conviction on the ground that the evidence was legally insufficient to support conviction." *Tibbs v. Florida*, 457 U.S 31 (1982); *United States v. Di Francesco*, 449 U.S. 117 (1980).



I would affirm the trial court's order denying defendants' motion to vacate the judgment of conviction pursuant to Fed. R. Crim. P. 35(a).

83-2558-U.S.A. v. BROCE CONSTRUCTION COMPANY, INC., et al

DOYLE, Circuit Judge, dissenting

I respectfully dissent from the majority opinions.

**Preliminary Statement**

This is a case in which the United States of America prosecuted Broce Construction Company and its President, Raymond C. Broce. The defendants plead guilty to two counts of conspiracy in restraint of trade, in violation of the Sherman Act, 15 U.S.C. § 1. Ray Broce also plead guilty to one count of mail fraud, 18 U.S.C. § 1341. Broce received a two year prison sentence and $101,000 in fines, $50,000 per conspiracy and $1,000 for the mail fraud conviction. Broce Construction was required to pay $1,500,000 in fines, $750,000 per conspiracy. The contention of the defendants is that these two conspiracies were so connected that they must be considered as a single conspiracy, an argument which is an important issue in the case. We maintain that there are two transactions and two conspiracies.

The fines are claimed to be in violation of the double jeopardy clause of the Fifth Amendment of the Constitution. The argument is that the defendants are being punished twice for a single offense. Another issue raised here is whether or not the defendants waived their double jeopardy claim by entering pleas of guilty to both of the conspiracy charges.

**The Indictments**

The first indictment was filed November 17, 1981 in the United States District Court for the District of Kansas, Case No. 81-20119-01. This charged the appellants in this case and Gerald R. Gumm, an employee of the company, with conspiracy to violate the Sherman Act, 15 U.S.C. § 1, and mail fraud, 18 U.S.C. § 1341, in connection with Project No. 23-60-RS-1080(9), a federal aid highway project let by the State of Kansas.

On February 4, 1982, a second indictment, Case No. 82-20011-01, was returned by the same grand jury, charging the appellants with conspiracy to violate the Sherman Act, 15 U.S.C. § 1. The latter Project No. KRL 29-2(26), was a public highway project also let by the State of Kansas (R.O.A. Vol. 1, p. 1). For purpose of this dissent the indictment filed on November 17, 1981, is referred to as Indictment 1 and the indictment filed on February 4 is treated as Indictment 2.

The present appeal concerns only the conspiracy in violation of the Sherman Act charged in Count I in Indictment 1, and the Sherman Act conspiracy in Indictment 2. The defendants seek to ignore the proposition that Indictment 2 is a separate and distinct claim. Their reason for this is that they have learned that the only possible door which could bring about a refund of the money paid as a fine would be by way of regarding the two indictments here considered as a single transaction, a conclusion which is not tenable. It was only after Mr. Broce had served his prison term that the idea of treating the two conspiracies as one transaction came to the surface. They claim that if there is but one transaction the fine should be returned. The theory is entirely new in a criminal case. These two transactions are not related so as to link these two projects. They have independent construction programs. Also they do not come together. They were some distance apart.



They would have us look back to a two year old plea of guilty which they say caused the payment of the $750,000 fine. It is said to have been a mistake of law the affect of which could result in being fined twice for one violation. They maintain that the two indictments are one transaction even though they are set forth in two transactions which do not pretend to be one.

We hold that the one transaction theory is invalid; and that these are clearly independent transactions. This single transaction idea was an afterthought. The defense has contended ever since Mr. Broce finished his prison term that it was a single transaction, as the result of which they claim that they are entitled to have returned their money paid as a fine in the second transaction. The effort to thus create a "single" transaction has no support in the cases or in the facts developed.

Appellants would have us look back two years to the plea of guilty and the $750,000 fine. They contend that this plea was the result of a mistake of law which should be recognized and the $750,000 should be restored. But even if the defendants have lost interest in this second indictment, we have not. Nor should we give them an *ex post facto* restoration which was also the product of afterthought. To consider this it would be necessary to find that the plea of guilty was unlawful and void. This is hard to accept in the present circumstances inasmuch as the plea of guilty was accepted by Broce as part of a plea bargain.

**The Pleas of Guilty**

On February 8, 1982 the appellants entered pleas of guilty in accordance with a plea bargain entered into between the defendants and the United States. (R.O.A. Vol. 2, p. 167) Defendant Ray C. Broce plead guilty to both counts of Indictment No. 1 and to Indictment No. 2. Broce Construction Company, Inc. plead guilty to Count I of Indictment No. 1 and Count I of Indictment No. 2

(R.O.A. Vol. 2, pp. 168-169). The defendant Broce, individually and on behalf of Broce Construction Company, affirmatively was advised of and waived rights to a speedy trial by jury, the right to compulsory process, and to cross-examination and the right against self-incrimination. No affirmative mention was made nor was any affirmative waiver given to the defendant's Fifth Amendment rights against double jeopardy.

Sentence was pronounced in case number 1 on March 15, 1982. At that time the corporation was fined the sum of $750,000 on each charge for a total of $1,500,000. The fines were to have been paid one-third by December 31, 1982, one-third by December 31, 1983 and one-third by December 31, 1984. The defendant Ray C. Broce personally was fined the sum of $50,000 and was sentenced to two years imprisonment on Count I of Indictment No. 1. On Count II of Indictment No. 1 he was fined the sum of $1,000 and sentenced to two years of imprisonment to be served concurrently with the sentence on Count I. On Indictment No. 2 defendant Broce was fined the sum of $50,000 and was sentenced to two years imprisonment to run concurrently with the sentences in Indictment No. 1. The fines were committed fines which were to have been paid immediately prior to the defendant's release from incarceration (R.O.A. Vol. 2, p. 203).

**The Motion To Vacate the Judgment**

On February 22, 1983, the defendants Broce Construction Company and Ray C. Broce filed a Motion to Vacate the Judgment and Sentence of the trial court in Indictment No. 2. Case No. 82-20011-01 (and to do away largely with the plea bargains), under the provisions of Federal Rules of Criminal Procedure 35(a). The judgment and sentence were alleged to have been illegal in that they violated the double jeopardy clause of the Fifth Amendment to the Constitution of the United States. The contention of



Broce Construction Company, Inc. was that the total of $1,500,000 in fines was illegal because it exceeded the $1,000,000 which they insist is the maximum amount if there was only one transaction rather than two (R.O.A. Vol. 1, p. 34 and Vol. 2, p. 212). The allegation of the appellants was that the two indictments presented, although purporting to charge two separate conspiracies, actually charged separate parts of a single overall conspiracy (R.O.A. Vol. 1, p. 34 and Vol 2, p. 212).

The United States government filed a response to appellants' motions on March 21, 1983. Most of its argument was that the appellants had waived their rights to raise double jeopardy by pleading guilty to both indictments. The government's argument concerning the actual basis for the motion was contained in one sentence: "The charges in the Broce indictments are not multiplicious on their face or in fact."

Defendant's theory in this appeal was inspired by a recent district court opinion by Judge Saffels in a similar case, *United States v. Beachner Construction Co., Inc.* Beachner had been acquitted of one bid-rigging conspiracy (Beachner I) and the government brought another indictment against them on a similar charge (Beachner II). Beachner urged the court to dismiss the record indictment on double jeopardy grounds. Judge Saffels found that the Beachner I and II indictments were different manifestations of a single conspiracy, that being because they described the same conspiracy. The Beachner II indictment named Jerry Beachner rather than Robert Beachner and Beachner II specified three different highway projects. Nevertheless Judge Saffels found that the conpiracies charged in Beachner I and Beachner II were merely separate parts of a single larger and on-going bid rigging conspiracy which had continued for several years. That opinion adopts the the contractors' position. In no way does it stand out as a precedent for this court. This led to

adoption of a similar theory in this case even though the facts and their aspects were wholly different.

The court held a hearing on the motion to vacate in the instant case on May 1, 1983. At that time the motion was taken under advisement. The court denied the motion and memorandum and order dated November 18, 1983, and held that the double jeopardy claim had been waived (R.Vol.1, pp. 100-112 and Vol. 2, pp. 278-290). This appeal was timely filed on November 28, 1983 (R.O.A. Vol. 1, p. 113 and Vol. 2, p. 291).

The question here is whether the double jeopardy clause of the Fifth Amendment of the United States Constitution was violated in that Ray C. Broce and Broce Construction Company, Inc. were punished twice for a single offense.

The result to the double jeopardy claim of entering a plea of guilty to the conspiracy charge is to add more fuel to the original fire. The fact that a plea of guilty was entered results in confirming by the defendants of both transactions.

There is no great dispute about the double jeopardy clause of the Fifth Amendment prohibiting infliction of multiple punishment for the same offense. There is essentially no dispute that if these indictments reflected one conspiracy that the appellant is not to be punished twice. The essence of *this* appeal is that the two transactions were actually divided into two sub-parts, one procedural and one factual.

*First,* the procedural question: Did the defendants waive their claims to double jeopardy?

*Second,* do the facts admitted by the appellant in pleading gulity allow this court to find that there was only one conspiracy, rather than two?

**Waiver of the Double Jeopardy Claim**

The general rule on waiver of constitutional claims is that a defendant waives all objections of a constitutional



nature when he voluntarily and knowingly enters a plea of guilty. *Tollett v. Henderson,* 411 U.S. 258. "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Id at 267.

The leading case concerning waiver of the double jeopardy provisions of the Fifth Amendment to the Constitution is *Menna v. New York,* 423 U.S. 61 (1975) (per curiam). In that case Menna had refused to answer questions before a New York State Grand Jury after a grant of immunity. He was adjudged in contempt and sentenced to 30 days in jail. This he served. Approximately ten years later he was indicted for the same conduct. After asserting unsuccessfully, in state court, that the indictment violated the double jeopardy prescription of the Fifth Amendment, he pleaded guilty to the indictment. He then appealed again raising the double jeopardy claim. The New York Court of Appeals declined to address the double jeopardy claim on the merits, holding that it had been waived by Menna's counseled plea of guilty.

The United States Supreme Court reversed in a per curiam decision which held that where the state is precluded by the United States Constitution from hauling a defendant into court on a charge, federal law requires that conviction on that charge be set aside even if conviction was entered pursuant to a counseled plea of guilty. The question is whether this holding is proper authority for the proposition that a claim of double jeopardy is not defeated by an intervening plea of guilty. The decision is confused by the court's statement in Footnote No. 2 to its decision. The Supreme Court ruled that it "did not hold that a double jeopardy claim may never be waived, but

simply held that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the state may not constitutionally prosecute."

In the instant case the defendants engaged in widespread plea bargaining. They paid a $750,000 fine. Two years later the defendant tried to renege two years after paying. It was argued by the defendants that they were charged twice. This was based on a new idea that he could challenge the plea of guilty—that he was entitled to challenge the validity of the $750,000 fine. The defendants seem to believe that they are free to renounce their plea of guilty. But the plea of guilty is a solid agreement to stand by the plea bargain. They cannot successfully decide to walk away from the plea of guilty which served so well before. It is not subject to walking out such as is being allowed by the majority here.

The majority of the circuit has not come to grips with the various features of double jeopardy. However, it seems likely that it would follow the fundamentals. Seemingly it would follow the principle that a plea of guilty is an admission of the elements and material facts of the formal criminal charge contained in the indictment. *See McCarthy v. U.S.* 394 U.S. 459. All non-jurisdictional defects are accepted.

The Court in *Menna* left unanswered the question of what constitutes a valid waiver of the Fifth Amendment claim and whether or not a plea of guilty to a charge which is not multiplicious on its face constitutes a waiver of the double jeopardy claim. The court did indicate in the same footnote that a counseled plea of guilty is an admission of factual guilt so reliable that it validly removes the issue of factual guilt from the case.

This circuit has no extraordinary knowledge to address these questions. At the same time other circuits have taken opposing positions. The Fifth and Ninth Circuits have had no trouble holding that a guilty plea does not result in the



waiver of a double jeopardy claim. *United States v. Broussard,* 645 F.2d 504 (5th Cir. 1981); *Launius v. United States,* 575 F.2d 770 (9th Cir. 1978). This Ninth Circuit decision indicates that a waiver of a double jeopardy claim *must* be a waiver as defined in *Johnson v. Zerbst,* 304 U.S. 458 (1938). There the court defined a waiver as the knowing relinquishment or abandonment of a known right or privilege. The Eighth and Second Circuits have ruled that a claim of double jeopardy is non-jurisdictional and is waived if not timely and effectively pleaded. *United States v. Herzog,* 644 F.2d 713 (8th Cir. 1981); *McClain v. Brown,* 587 F.2d 389 (8th Cir. 1978); *United States v. Perez,* 565 F.2d 1227 (2nd Cir. 1977). These decisions thus seem to conflict with the decision in *Menna, supra.* The court below nevertheless chose not to apply the waiver theories of either the *Launius* or *Herzog* line of cases. Rather the court chose as controlling the opinion in *Kerrigan v. United States,* 644 F.2d 47 (1st Cir. 1981). It stated that the case more closely resembled the facts and issues in terms of the instant one.

In *Kerrigan* two separate indictments which conspired to transport stolen merchandise in interstate commerce. In the first indictment it was averred that Kerrigan, Kirkwood and a third person, Lambert, had conspired and agreed to transport lithographs stolen in Boston, Massachusetts during a period of time between August 25, 1977 and September 1, 1977. The second indictment alleged that Kerrigan and Kirkwood conspired and agreed to transport jewelery stolen from West Dennis, Massachusetts during a time between September 1, 1977 and September 22, 1977. The court held that despite the holdings and findings in *Menna* and *Launius,* a defendant who had pleaded guilty to indictments which did not on their face charge multiple conspiracies could not waive a double jeopardy claim after a plea of guilty.

The court reasoned that the court in *Launius* had stated that "by pleading guilty the defendant admitted the facts alleged in the information." The court further proceeded to hold that after pleading guilty a defendant is precluded from contesting the factual or theoretical basis of the charges. The addition of the theoretical basis for the charges is the court's own. Neither *Menna* nor *Launius* contained any language pertaining to this theory behind the government's case, even though both state that a plea of guilty admits facts alleged.

In *Kerrigan* the court proceeded to analyze the indictment according to tests for double jeopardy in conspiracy cases. In *United States v. DeFillipo,* 590 F.2d 1228 (2nd Cir. 1979), the relevant factors examined were the dates of the purported agreements, the identity of each of the alleged conspirators, and the specific criminal acts to the commission of which the defendants were alleged to have agreed. The court found that based on these factors the two indictments were not multiplicious on their face.

In closing it is fair to conclude that a defendant who waives all facts in effect accepts them. Such a man generally must proceed with the burden of the facts.

**One Conspiracy From Two**

It is apparent from the above that the defendants depend on the similarity of the form of the contracts in question. Thus, they say that these contracts are the same; a part of the same conspiracy. They argue that as a result of their calling the two contracts one contract that they automatically assume this character. They neglect the positive facts which point to each contract having an individual character. They were entered at two separate times and in two separate places. In fact the roads involved are located at different places and are not connected. The fact that the two contracts are similar in form has no consequence. Lawyers are noted for utilizing a



form. Therefore, the fact that the two contracts are similar does not suggest that they are identical. It could be said that the second contract was copied from an earlier existing contract. When the second contract was executed the company pursued and obtained another independent job. No amount of wishing can change this fact.

Part of the defendants' position is that the sentences of the defendants Ray C. Broce and Broce Construction Company, Inc., are in violation of the double jeopardy clause of the Fifth Amendment of the United States Constitution on the ground of multiplicity in that they are being punished twice for a single offense. There are so many features that demonstrate that these two indictments were based on individual transactions.

There are several reasons for this being two transactions. First, these transactions had different contracts. If they had wished to have a single contract they perhaps could have brought about a less damaging result by referring in that to the various provisions instead of writing a brand new contract. Surely these businessmen know that one does not write two contracts for one transaction.

Second, such contracts conceivably could be part of one transaction if they both pertained to the same highway. They do not. The two highways are in completely different geographical locations.

Third, several months passed between the completion of contract number one and the undertaking of contract number two. This chronological gap implies that there were two transactions.

Fourth, this also persuades that they were not thinking at the time of the various signings that this was just one transaction. This being the case if there had been an effort to keep it under one roof there would have been only one agreement for the two roads.

It appears that these two projects fell short of being one. The double aspect was clearly an after-thought which was

brought about two years too late to be of service to these defendants. How could the defendants demand their money back after two years has passed? The district court, Judge O'Conner, reached the conclusion that these were two distinct transactions and thus the defendant was not punished twice. Finally, the defendants tried to cure the problem by saying that one conspiracy permeated the entire work of Broce Co. But a careful examination of the two contracts reveals that they clearly represent distinct transactions. The "conspiracy" came to life long after the creation of the contracts. Although it seemed to have been brought to the surface in an effort to establish the double jeopardy claim. But it fails.

**The Conclusion**

The record reveals that the defendants waived any and all rights under the double jeopardy clause. This came about when the defendants agreed to voluntary pleas of guilty. It was not until Broce's release from prison that they came forward with their present claims. But even if their rights under the double jeopardy clause were not waived, the guilty pleas admit the facts in the indictments, both of which plainly acknowledge two separate conspiracies. Not only that, the facts readily reveal that under no theory could their conduct be ruled to be part of a single larger conspiracy. The attempt by the defendants to put forth a single larger conspiracy fails miserably. The trial court saw through their efforts to restore a past which itself fails. The result that they seek does not emerge.

The argument is that Broce has continuously been in a conspiracy the object of which was to realize excessive gain at the expense of Kansas and United States taxpayers. The defendants here do not hesitate to acknowledge this. This demand seeks to undo the payments which the court assessed as punishment for their misdeeds.



To allow them to obtain this is contrary to law including not only laws of Congress, but also the United States Constitution.

In addition it would set a precedent which could allow courts to disregard the United States laws in favor of their own ideas. The judge in this case rejected these efforts and upheld the law. To accept the position of the majority would favor these defendants and would create a system which tolerates the undoing of pleas of guilty. This at least would weaken the system of law which was adopted in 1789. Besides the general developments here suggested, it would leave a system which criminals could manipulate according to their will and their money.

Finally, no laws or rules could justify a result which holds out a consequence which they here demand. More violations can be expected if the criminals can apply that which they wish rather than that which they agree to.

**APPENDIX**

Count I of Indictment 1 consists of fifteen numbered paragraphs divided into seven sections designated by I through VII. Section I is headed "Definitions" and consists of Paragraph 1 which is divided into three sub-paragraphs, (a), (b), (c). The sub-paragraphs define the terms "highway construction", "highway construction contract" and "federal-aid highways", respectively. Section II is entitled "defendants" and consists of Paragraphs 2 and 3. Paragraph 2 alleges that Ray C. Broce is President and Gerald R. Gumm is General Manager of Broce Construction Company. The paragraph further identifies that Broce Construction Company is a corporation organized under the laws of the State of Kansas which does business particularly at Dodge City, Kansas. Paragraph 3 states that any reference to an act of a corporation means that the corporation acted through its officers or agents, etc.

while they were actively engaged in the management, etc. of a corporation.

Much of the remaining space is devoted to the similarity in wording of the various provisions in each indictment. It proves little if anything. It repeats and repeats more of the materials in the two indictments.

Section III is entitled "co-conspirators" and consists of Paragraph 4 only. This latter paragraph states that various persons and firms not made defendants participated as co-conspirators in the offense charged and performed acts and made statements in furtherance thereof.

Section IV is entitled "trade and commerce" and it consists of five paragraphs.

Paragraph 5 asserts that federal aid highways, including the highway which is the subject of the indictment, are part of a nationwide network of inter-connecting highways over which interstate commerce is conducted.

Paragraph 6 states that there exists under the Federal Aid Highway Act, 23 U.S.C. 2d 101, *et seq.*, a cooperative effort on the part of states and the federal government, including the State of Kansas, for the development and construction of highways, including the highway which is the subject of this indictment.

Paragraph 7 alleges that the State of Kansas during the time period of the indictment sought sealed competitive bids from highway construction contractors.

Paragraph 8 states that Kansas requires that highway projects over $1,000 be bid competitively. Paragraph 9 explains that Kansas bidding regulations require a statement of non-collusion in it. Paragraph 10 states that materials travelling in interstate commerce were used in Kansas highway projects including the one which is the subject of the indictments. To say that the Kansas bidding regulations require a statement of non-collusion in each bid is superfluous inasmuch as there is nothing but collusion throughout all of these briefs. They have undertaken to set



forth all of the contractual matters; but at the same time they allege that these were evidences of collusion. At the same time they back away from this conclusion any time a law violation comes into view. Unquestionably the appellants and Gerald R. Gumm and others unknown conspired to suppress and eliminate competition for the construction of Kansas Highway Project No. 23-60-R.S.1080 (9) in violation of the Sherman Act (15 U.S.C. § 1).

Paragraph 12 states that the conspiracy was set forth in the agreement. It alleges that there was understanding and concert of action among conspirators. The substantial terms of a conspiracy were (a) to allocate the construction project named to Broce Construction Company; (b) to cement collusive, non-competitive and rigged bids to the State of Kansas in connection with the project. Paragraph 13 alleges that overt acts were committed. These included (a) discussing the submission of bids on the projects; (b) designating the successful low bidder on the project; (c) the submission of intentionally high bids by co-conspirators; (d) submitting bids containing false, fictitious and fraudulent statements and entries; and (e) discussing the submission of prospective bids on other projects let by the State of Kansas on April 25, 1978. (R.O.A. Vol. 2, pp. 139-140)

Section VI is labeled "effects" and it consists of Paragraph 14. This latter sets forth among other effects of the conspiracy: (a) that it caused the prices for the project to be maintained as artificial and non-competitive levels; (b) that it caused competition in the construction of the project to be eliminated; (c) that it caused the State of Kansas to be denied the right to receive competitive bids on the project; and (d) that it caused the State of Kansas and the United States to be denied the benefits of competition on the project. In other words, the showing is unmistaken inasmuch as it establishes a violation of the Sherman Act and admits it with candor. Thus the conspiracy was de-

signed in order to avoid the law; the Sherman Act. The object was to set aside the Sherman Act in favor of a small group of contractors who do not compete. Their effort is to fix prices among the selected few. The United States Government sought to prosecute these participants and the litigation by the contractors simply ignores this effort.

Another part, Section VII, is entitled "jurisdiction and venue". It undertakes in Paragraph 15 to reveal that the conspiracy was formed and carried out within the District of Kansas during five years following the return of the indictment. (R.O.A. Vol. 2, p. 140)

Count II of Indictment No. 1 is not primarily involved in this appeal and accordingly, there is nothing to be gained by summarizing it.

Indictment No. 2 is organized with great care. It has seven sections designated by roman numerals. The section headings are identical to those in Indictment No. 1. That is as far as the similarity goes. The indictment consists of fourteen numbered paragraphs. Section I entitled "definitions" consists of Paragraph No. 1 which is divided into sub-paragraphs (a) and (b), which define the term "highway construction" and "highway construction contractor", respectively. (R.O.A. Vol. 1, p. 1) The definitions of those terms are identical to the definitions given in Section I of Indictment No. 1, the only difference in the two sections being that Indictment No. 2 fails to define the term "federal-aid highways."

Section II entitled "defendants" consists of Paragraphs 2 and 3 (R.O.A. Vol. 1, pp. 1-2). Paragraph 2 is identical to the same paragraph in Indictment No. 1 except that it contains no reference to Gerald R. Gumm. Paragraph 3 is exactly identical to Paragraph 3 of Indictment No. 1.

Section III is entitled "co-conspirators" and consists of Paragraph 4. (R.O.A. Vol. 1, p. 2) Section III is identical to Section III of Indictment No. 1.



**Trade and Commerce**

Section IV which is entitled "trade and commerce" consists of Paragraphs 5 through 9. (R.O.A. Vol. 1, pp. 2-3) Paragraph 5 is identical to Section IV, Paragraph 5 of Indictment No. 1, except that it begins with the words "public highways", instead of the words "federal-aid highways". This feature does not lack truth. The term "federal-aid highways" is correct because federal aid was exactly what it was. Undoubtedly federal money was the important object in the entire project.

Paragraph 6 is identical to Section IV, Paragraph 7 of Indictment No. 1. Paragraph 7 is identical to Section IV, Paragraph 8 of Indictment No. 1. Paragraph 8 is identical to Section IV, Paragraph 9 of Indictment No. 1. Paragraph 9 is identical to Paragraph 10 of Indictment No. 1. The only major difference between Sections IV of the two indictments is that Indictment No. 1 contains a paragraph describing state and federal cooperation under the Federal Aid Highway Act (15 U.S.C. § 101, *et seq.*). *See* Paragraph 6 of Indictment No. 1.

Indictment No. 2 deals with a completely different area for the building of the highway and it uses various headings and discussions. Thus Section V of Indictment No. 2, entitled "offense charged" consists of Paragraphs 10 through 12 of the indictment. Paragraph 10 is identical to Paragraph 11 of Section V of Indictment No. 1 except for the project number. In Indictment No. 2 the project number is K.R.L. 29-2(26); the date of the bid letting, July 17, 1979. The description of the project as a "public highway project" rather than a "federal-aid highway project", and the date of commencement of the conspiracy, in or about July, 1979. Paragraph 11 is identical to Paragraph 12 of Indictment No. 1 except for the project number and date of letting in sub-paragraph (a) and the

reference to the project as a "public highway project", rather than a "federal-aid highway project."

Paragraph 12 of Indictment No. 2 is identical in charging overt acts in furtherance of a conspiracy in Paragraph 13 of Indictment No. 1. The exception is referring to the different project numbers, sub-paragraph (e) being the only exception. Indictment No. 2, sub-paragraph (e) alleges a discussion of the payment of consideration to another contractor and in Indictment No. 1, sub-paragraph (e) alleges the discussion of the submission of bids on other projects.

Section VI entitled "effects" consists of Paragraph 13. (R.O.A. Vol. 1, page 5) It has identity to Section VI of Indictment No. 1 except for the desciption of the project as a "public highway project" rather than a "federal-aid highway project", and there is the elimination of a reference to the United States in sub-paragraph (d).

Section VII is entitled "jurisdiction and venue" and consists of paragraph 14 of the indictment. (R.O.A. Vol. 1, p. 6) Section VII of Indictment No. 2 is identical to Section VII of Indictment No. 1.



**APPENDIX D**

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 83-2558 & 83-2559

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.,
DEFENDANTS-APPELLANTS

Appeal from the United States District Court
For the District of Kansas
(D.C. Nos. 82-20011-01 and 81-20119-01)

[Filed: Jan. 9, 1985]

Before: SETH and DOYLE, Circuit Judges, and BOHANON, Senior District Judge.*

*Honorable Luther Bohanon of the United States District Court for the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

BOHANON, District Judge.

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Broce Construction Co. and Ray C. Broce (hereinafter "defendants") appeal from an order of the United States District Court for the District of Kansas denying their motion to vacate the judgment and sentence entered by that court March 15, 1981, in one of the two cases combined here on appeal. Defendants claim that the judgment and sentence in question are in violation of the Double Jeopardy Clause of the United States Constitution. The district court, without making a finding as to whether the two sentences did in fact violate the Double Jeopardy Clause, found that defendants had waived their rights to raise that issue by pleading guilty to the indictment supporting the judgment and sentence challenged. The central issue on appeal is whether the trial court's finding of waiver was erroneous.

Defendants were indicted by a grand jury in Case No. 83-2559 (No. 81-20119-01 below) on November 17, 1981. That indictment charged, in Count I, violations of the Sherman Act, 15 U.S.C. § 1 (1976), and, in Count II, violation of the mail fraud statute, 18 U.S.C. § 1341 (1976), in connection with a conspiracy to rig bids submitted to the State of Kansas on a particular highway construction job, designated by the State as Project No. 23-60-RS-1080(9) and let for bidding on April 25, 1978. The mail fraud count of this indictment is not involved in this appeal and will not be discussed further.

On February 4, 1982, the same grand jury returned a second indictment against defendants in Case No. 83-2558 (No. 82-20011-01 below) charging violation of the Sherman Act in connection with a conspiracy to rig bids on yet another Kansas highway construction job, designated Project No. KRL 29-2(26) and let by the State on July 17,



1979. Threatened by government prosecutors with a series of further indictments for each highway project believed to have been rigged, defendants accepted a plea bargain wherein they agreed to plead guilty to two indictments charging conspiracy to violate the Sherman Act in exchange for the government's promise not to prosecute them "for or on account of any collusion between defendant[s] and other contractors regarding any other highway, street or airport runway construction projects let by awarding authorities within the States of Kansas and Oklahoma prior to the date" of the plea bargain. (ROA at 150).

Accordingly, on February 8, 1982, defendants entered pleas of guilty to both pending indictments. At that time, Mr. Broce, appearing both on his own behalf and on behalf of the corporation, was advised of and waived both defendants' rights to be represented by separate counsel, to have a speedy and public trial by a jury, to cross-examine all opposing witnesses, to utilize compulsory process, to be free from compelled self-incrimination, and to be presumed innocent until the government established guilt by competant evidence to the satisfaction of the judge or jury beyond a reasonable doubt. The record of these proceedings does not disclose, however, that Mr. Broce was at any time advised of his and the defendant corporation's double jeopardy rights or that these rights were ever considered by any party to the proceedings. Subsequently, on March 15, 1982, sentence was pronounced in both cases; Broce Construction Co. received a $750,000 fine for the antitrust count in each case, for a total fine of $1,500,000, and Ray C. Broce received a $50,000 fine and two years inprisonment for each antitrust charge, the two 2-year prison terms to run concurrently. Mr. Broce paid his $100,000 total fines on June 2, 1982, and has already completed his prison terms. Broce

Construction Co. was allowed to pay its fines in installments and still owes a substantial sum despite timely payments.

On February 22, 1983, the defendants, pursuant to F.R.Crim.P. 35(a),[1] filed a motion to vacate the judgment and sentence of the trial court in the second-filed case (here No. 83-2558) claiming that the judgment and sentence therein were illegal for violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. This motion was prompted by a memorandum and order filed on January 31, 1983, in a similar case in the same judicial district, *United States of America v. Beachner Construction Co., Inc.*, 555 F. Supp. 1273 (D. Kan. 1983), *affirmed* by this court, 729 F.2d 1278 (1984). In that case, District Judge Saffels found, after an evidentiary hearing, that a second prosecution, for conspiracy to rig bids on Kansas highway construction projects, of defendants who had previously been acquitted by a jury under an indictment differing from the second only with respect to the specific named project and other irrelevant matters, was contrary to the Double Jeopardy Clause. Defendants in the instant case claim that, as in *Beachner,* the second indictment filed against them, though purporting to charge a separate conspiracy than the charged in the first indictment by naming a different construction project, in fact did no more than again draw them into jeopardy for another part of a single overall conspiracy. The district court below found, however, that by pleading guilty to both indictments defendants had admitted the facts and theory alleged in the indictments, that these indictments did not on their faces give rise to a double jeopardy claim, and that the defendants had effectively waived their right to raise a double jeopardy claim based upon any version of the facts differing from that admitted

[1] Fed.R.Crim.P. 35(a) provides that "The court may correct an illegal sentence at any time . . ."



by their guilty pleas. In effect, the district court left open, without deciding, the possibility that the sentences imposed for the second indictment did in fact, if not on the face of the indictment, violate the double jeopardy clause, but determined that even if the sentences were so illegal, the defendants had waived by pleading guilty their right to challenge the sentences on that basis.

The fundamental rule of law which, *ceteris peribus*, would govern this case is that "a single continuing conspiracy, however diverse its objects, cannot be broken down into component subagreements for the purpose of multiple punishments or multiple prosecutions." *United States v. Tanner*, 471 F.2d 128, 141 (7th Cir. 1972) *citing Braverman v. United States*, 317 U.S. 49 (1942); *cf. Sanabria v. United States*, 437 U.S. 54, 72 (1978); *Brown v. Ohio*, 432 U.S. 161, 169 (1977).[2] The evidentiary corollary states that "[w]hen . . . the separate conspiracies [alleged] are both founded upon a general conspiracy statute, the relevant inquiry is whether there existed more than one *agreement* to perform some illegal act or acts. *Ward v. United States*, 694 F.2d 654, 661 (11th Cir. 1983)" (emphasis in original).

We are confronted at the outset, however, with the question of what effect, if any, the defendants' guilty pleas have on the applicability of these general rules. Well-established precedent in this circuit prescribes that a guilty plea by a defendant waives his right to challenge his consequent sentence on the grounds of double jeopardy. This

[2] Lest we go adrift in what one Supreme Court justice has termed "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator", *Albernaz v. United States*, 450 U.S. 333, 343 (1981), this case should be distinguished from one in which the government has alleged that a single transaction violates two distinct conspiracy statutes. *Id., American Tobacco Co. v. United States*, 328 U.S. 781 (1946). Here it is clear that only one conspiracy statute, 15 U.S.C. § 1, is involved and that the government has alleged repeated violations of it.

rule was clearly spelled out in the following language from *Caballero v. Hudspeth*, 114 F.2d 545, 547-48 (10th Cir. 1940):

> The two counts of the indictment stating but a single offense, it follows that petitioner suffered double jeopardy under the sentence of the court.
>
> The question of double jeopardy may not, however, be raised by petitioner in the present proceeding. On June 7, 1937, petitioner withdrew his former plea of not guilty and entered a plea of guilty to both counts of the indictment. No objection was raised at any stage of the proceedings to the sentence of the court. *The right to not be placed in jeopardy twice for the same offense is a personal right. It is an immunity granted to the citizen by our constitution and may be waived. The plea of guilty by the defendant constituted a waiver of this right.* At no stage of the proceedings did he assert this constitutional guarantee. The defense may not now be raised for the first time by writ of habeas corpus. Brady v. United States, 8 Cir., 24 F.2d 399; Curtis v. United States, 10 Cir., 67 F.2d 943; United States ex rel. Poch v. Hill, 3 Cir., 71 F.2d 906, 907; Bracey v. Zerbst, 10 Cir. 93 F.2d 8.

(emphasis added). As recently as *Cox v. Crouse*, 376 F.2d 824, 826 (10th Cir. 1967) this court stated:

> We find it unnecessary to decide whether Cox, by rearraignment on the original kidnapping charge, was again placed in jeopardy for an offense of which he had been acquitted. Here the appellant pled guilty after his rearraignment and thereby waived his defenses to the charge, including, but not by way of limitation, the defense of double jeopardy.

Indeed, cases in support of this view of the double jeopardy right were legion from all jurisdictions prior to 1975.



*See e.g.*, cases cited in *Brady v. United States*, 24 F.2d 399, 405 (8th Cir. 1928).

This line of cases, however, was supported only by scant and oblique citation to Supreme Court precedent and its validity has been drawn into question in recent years by the High Court's opinions in *Blackledge v. Perry*, 417 U.S. 21 (1974) and *Menna v. New York*, 423 U.S. 61 (1975). In *Green v. Estelle*, 524 F.2d 1243 (5th Cir. 1975), for example, the Fifth Circuit reversed a district court decision that expressly relied upon the above-cited portion of *Cox v. Crouse* because it found the *Menna* decision, handed down while *Green* was pending before the circuit, to be controlling. *Id.* at 1244. Though *Caballero* has been cited by this court as established, though not dispositive, precedent as recently as 1978, *United States v. Rich*, 589 F.2d 1025, 1032, 1033, we have never had occasion to consider the continuing validity *vel non* of *Caballero* in the light of *Blackledge* and *Menna*. From the discussion which follows, we feel it is clear that *Caballero* can no longer stand and must be overruled.

*Blackledge* is not actually a double jeopardy case. Though the respondent there had claimed that his double jeopardy right was infringed, the court did not reach that issue, deciding the case instead on due process grounds. The case involved a criminal defendant in North Carolina who exercised his right to a trial *de novo* on appeal to a County Superior Court after conviction for a misdemeanor offense in the County District Court. After he filed his appeal, but before the trial *de novo* was held, Perry, the defendant, was indicted on a felony charge based upon the same conduct involved in his earlier misdemeanor conviction. Perry pled guilty to the felony charge and was sentenced to five to seven years in the penitentiary. The case came before the Supreme Court on subsequent habeas proceedings. The Court first held that the potential for prosecutorial vindictiveness inherent in North

Carolina's treatment of Perry rendered the filing of the felony indictment a violation of due process. Then the Court addressed the issue of whether Perry's guilty plea to that indictment had waived his right to raise the due process issue in federal habeas corpus proceedings.

The Court directly addressed the government petitioner's reliance upon earlier cases in which a guilty plea had been found to waive certain constitutional rights, namely, *Tollett v. Henderson*, 411 U.S. 258 (1973) and the so-called "Brady trilogy:" *Brady v. United States*, 397 U.S. 742 (1970), *McMann v. Richardson*, 397 U.S. 759 (1970), and *Parker v. North Carolina*, 379 U.S. 790 (1970). Two of these cases, *Brady* and *McMann*, have also been used by the government in the instant case to support its claim that that the present defendants are precluded from raising their double jeopardy claims now. Because the Court's discussion of the "fundamental distinction" between the rights involved in those cases and that invoked by Perry in *Blackledge* reveals a conceptual difference of paramount importance for understanding the Double Jeopardy Clause, it is quoted here at length:

> While petitioner's reliance upon the *Tollett* opinion is understandable, there is a fundamental distinction between this case and that one. Although the underlying claims presented in *Tollett* and the *Brady* trilogy were of constitutional dimensions, none went to *the very power of the State to bring the defendant into court to answer the charge brought against him.* The defendants in *McMann v. Richardson,* for example, could surely have been brought to trial without the use of the allegedly coerced confessions, and even a tainted indictment of the sort alleged in *Tollett* could have been "cured" through a new indictment by a properly selected grand jury. In the case at hand, by contrast, the nature of the underlying constitutional infirmity is markedly different. Having chosen



> originally to proceed on the misdemeanor charge in the District Court, the State of North Carolina was, under the facts of this case, simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge in the Superior Court. Unlike the defendant in *Tollett*, Perry is not complaining of "antecedent constitutional violations" or of a "deprivation of constitutional rights that occurred prior to the entry of the guilty plea." 411 U.S. at 266, 267. Rather, *the right that he asserts and that we today accept is the right not to be haled into court at all upon the felony charge.* The *very initiation of the proceedings* against him in the Superior Court thus operated to deny him due process of law.
>
> *Last Term in Robinson v. McNeil, 409 U.S. 505, in explaining why the Double Jeopardy Clause is distinctive, the Court noted that "its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial."* Id., at 509. While our judgment today is not based upon the Double Jeopardy Clause, we think that the quoted language aptly describes the due process right upon which our judgment *is* based. The "practical result" dictated by the Due Process Clause in this case is that North Carolina simply could not permissibly require Perry to answer to the felony charge. That being so, it follows that his guilty plea did not foreclose him from attacking his conviction in the Superior Court proceedings through a federal writ of habeas corpus.

417 U.S. at 30-31 (emphasis added).

In *Menna v. New York*, 423 U.S. 61 (1975), this same reasoning was applied to a straight forward double jeopardy claim. There the petitioner had refused both to answer questions put to him by a grand jury and to obey a court order to testify before the same grand jury. His failure to

obey the court order was punished as contempt with a 30-day jail term, which he served. Over a year later he was indicted for refusing to answer questions before the grand jury. He raised his double jeopardy claim in the trial court but was overruled and subsequently pled guilty to the indictment. On appeal he again claimed that the Double Jeopardy Clause barred the prosecution of the indictment, but the New York Court of Appeals found that this claim had been waived by his counseled plea of guilty. The Supreme Court, in a very short opinion, granted certiorari and reversed and remanded the case for determination on the merits of the double jeopardy claim. The *per curiam* opinion states simply:

> Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty. *Blackledge v. Perry*, 417 U.S. 21, 30 (1974).

423 U.S. at 62.

If the Court had been content to rest with that statement, *Menna* could easily be seen to be dispositive of the present controversy. However, at the end of a substantial footnote the Court hedged its *Menna* holding:

> We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the State may not constitutionally prosecute.

423 U.S. at 62, 63 n. 2. This statement has been used by some courts to effectively deprive *Menna* of any force whatsoever. For example, *United States v. Herzog*, 644 F.2d 713, 716 (8th Cir.), *cert. denied* 451 U.S. 1018 (1981), involving habeas proceedings by a criminal defendant seeking to withdraw several guilty pleas, states that "dou-



ble jeopardy is a personal defense and not jurisdictional . . . [and] usually cannot, after conviction, be raised" in habeas proceedings. This is a mere recitation of the former rule which appears to fly directly in the face of the theory of the Double Jeopardy Clause set forth in *Blackledge* and *Menna*.

Citing *Herzog*, the government suggests that the present case is distinguishable from *Menna* because there the defendant first raised his double jeopardy claim in the trial court before pleading guilty, while here Broce and his attorneys made no mention of the right until more than a year after the guilty pleas were entered. The *Menna* court, however, did not indicate in any way that its decision was premised upon the fact that the double jeopardy issue in that case was raised prior to the guilty plea. Instead, it focused on the fact that if the indictment violated the Double Jeopardy Clause the *State* was precluded by the Constitution from forcing the defendant into court in the first place. Indeed, *Blackledge*, upon which *Menna* is firmly based, shows conclusively that claims relevant to "the very power of the state to bring the defendant into court" can be raised after a guilty plea, even, *Herzog* notwithstanding, in habeas corpus proceedings.

We feel that a more appropriate reading of *Menna* would find the Supreme Court's intent to be that while it is possible for a criminal defendant to waive his double jeopardy rights, a mere plea of guilty, without more, is not such a waiver. *Cf. United States v. Gaertner*, 583 F.2d 308, 311 (7th Cir. 1978). ("upon review of *Blackledge* . . . and *Menna* . . . it is *certain* that the preclusive effects of guilty pleas do not apply to constitutional claims which go 'to the very power of the State to bring the defendant into court to answer the charge brought against him.' *Blackledge v. Perry, supra*, 417 U.S. at 30 . . ." (emphasis added)); *Green v. Estelle*, 524 F.2d 1243, 1244 (5th Cir. 1975) ("*Menna* . . . holds that where a valid double

jeopardy claim would preclude a constitutional prosecution, a plea of guilty to that charge does not extinguish the double jeopardy claim."). The distincition between so-called "personal rights" and "jurisdictional defects" employed in *Herzog* and in this court's own former opinions has not been endorsed by the Supreme Court and is clearly inadequate to accommodate the "distinctive" character of the Double Jeopardy Clause. *Blackledge*, 417 U.S. at 31; *Robinson v. Neil*, 409 U.S. 505, 509 (1973).[3]

This understanding of *Menna* is reinforced when the portion of footnote 2 in that opinion, quoted above and seized upon by the *Herzog* court to justify its errant interpretation, is read in conjunction with the preceding portion of the footnote:

> Neither *Tollett v. Henderson*, 411 U.S. 258 (1973), nor our earlier cases on which it relied, *e.g., Brady v. United States*, 397 U.S. 742 (1970), and *McMann v. Richardson*, 397 U.S. 759 (1970), stand for the proposition that counseled guilty pleas inevitably "waive" all antecedent constitutional violations. If they did so hold, the New York Court of Appeals might be correct. However, in *Tollett* we emphasized that waiver was not the basic ingredient of this line of cases, 411 U.S., at 266. The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent

[3] *Cf.* Fed.R.Crim.P. 12(b) and the corresponding *Note of the Advisory Committee on Rules*, providing that objections based on former jeopardy, like those pleading lack of jurisdiction, are not waived by failure to raise them before trial as many other objections based upon constitutional rights are.



> with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim.

423 U.S. at 62, 63 n. 2 (emphasis in original)[4]

In point of fact, the Supreme Court has never endorsed a "waiver" theory with regard to double jeopardy rights, even when holding, for example, that the Double Jeopardy Clause "does not relieve a defendant from the consequences of his voluntary choice" to "seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence," *i.e.*, preindictment delay, so that the government was entitled to appeal the trial court's granting of the requested dismissal. *United States v. Scott*, 437 U.S. 82, 98, 99 (1978). In *Green v. United States*, 355 U.S. 184 (1957), a criminal defendant was indicted and tried for first degree murder. The jury, after instruction on the lesser included offense, found the defendant guilty only of second degree murder, and its verdict was silent as to the first degree charge. On appeal the conviction was reversed and remanded for a new trial. On remand the defendant, despite his plea of former jeopardy, was again tried for first degree murder, instead of second degree, was convicted and sentenced to death. The Supreme Court's opinion reversing the second conviction contains the following discussion:

> [T]he Government contends that Green "waived" his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a *successful* appeal of his improper conviction of second degree murder. We cannot accept this

[4] In the present case, defendants in fact continue to admit their guilt, and any other factual issues involved in their pleas to the second indictment are actually irrelevant. The trial court's reasoning to the contrary will be discussed in more detail later.

paradoxical contention. "Waiver" is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. *Cf. Johnson v. Zerbst,* 304 U.S. 458. When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he "chooses" to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice. And as Mr. Justice Holmes observed, with regard to this same matter in *Kepner v. United States*, 195 U.S. 100, at 135: "Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States."

355 U.S. at 191, 192 (emphasis in original).

In the present case, the offenses and punishment involved are much less serious than those involved in *Green.* Nonetheless, there is in this case, too, little evidence of a voluntary knowing relinquishment of the double jeopardy right. As was said in *United States v. Anderson,* 514 F.2d 583, 586 (7th Cir. 1975), decided before *Menna*, "[a] double jeopardy defense is normally not the type of claim that would be foregone for some strategic purpose." In this case the defendants did not receive a copy of the second indictment until nearly four days after it was filed and pled guilty to it immediately thereafter. The record is devoid of any indication that, prior to these pleas, a waiver of double jeopardy rights was discussed or bargained for by the government or was in any way brought to the attention of Mr. Broce or his counsel. The trial court's cautionary



remarks to Mr. Broce prior to accepting his pleas reminded him of a full catalog of constitutional rights with the notable exception that no reference whatsoever was made to the protection created by the Double Jeopardy Clause. The very fact that defendants did not raise their double jeopardy claim until after the *Beachner* opinion was filed is some indication that prior to the guilty pleas Mr. Broce and his counsel had not even considered the matter. The record in fact contains, in the uncontradicted affidavit of the attorney who represented the defendants when they pled guilty and later at their sentencing, positive evidence that the question of double jeopardy was not considered by defendants prior to their pleas. In short, being mindful of the rule that " 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights,' " *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) *quoting Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) and *Ohio Bell Telephone Co. v. Public Utilities Comm'n.*, 301 U.S. 292, 307 (1937), this court is compelled to conclude that, with respect to the defendants' double jeopardy rights, there has been no "intentional relinquishment or abandonment of a known right or privilege." *Zerbst*, 304 U.S. at 464.

The trial court below found yet another seeming loophole in the *Menna* opinion. Focusing again on the qualifying footnote remark quoted above, the district court noted that the last sentence limited the force of *Menna* to allow raising a double jeopardy claim after a guilty plea only against an indictment that "judged on its face" was violative of the Double Jeopardy Clause. The trial court then observed that in contrast to the indictment in *Menna* "the challenged second indictment in the instant case (No. 82-20011-01) does not *on its face* seek to punish the defendants for the same conduct for which they were charged in the previous indictment (No. 81-20119-01)."

slip op. at 8 (Nov. 18, 1983) (emphasis in original). Concluding that the precise issue before it had never been expressly decided by the Supreme Court, the trial court followed the holding of *Kerrigan v. United States*, 644 F.2d 47 (1st Cir. 1981) to find that a guilty plea bars a criminal defendant from demonstrating a valid double jeopardy claim based on any version of the facts differing from that stated in the indictments against him. We find this interpretation of *Menna*, and of the United States Constitution, and its application to the present cases to be deficient in several respects which we will examine in turn.

First, we consider the trial court's finding that the present indictments on their faces allege distinct criminal conspiracies. For this purpose it will be necessary to consider the actual language of these indictments in some detail. Without quoting, it may be noted that the following pairs of numbered paragraphs from the two indictments are in fact identical:

| First Indictment<br>Case No. 81-20119-01 | Second Indictment<br>Case No. 82-20011-01 |
|---|---|
| ¶ 1(a) & (b) | ¶ 1(a) & (b) |
| ¶ 2 | ¶ 2 |
| ¶ 3 | ¶ 3 |
| ¶ 4 | ¶ 4 |
| ¶ 7 | ¶ 6 |
| ¶ 8 | ¶ 7 |
| ¶ 9 | ¶ 8 |
| ¶ 10 | ¶ 9 |

In addition, section VI of each indictment, consisting of paragraph 13(a)-(d) in the first case and paragraph 14(a)-(d) in the second, which describes the "Effects" of the alleged conspiracies, differ only in that where the first indictment refers to a "Federal-Aid highway project" the second refers to a "public highway construction project."

The following language appearing in the "Offense Charged" section is also identical in both indictments. The



blanks denote differences in paragraph numbers, project numbers, dates, the above-mentioned substitution of "public highway construction" for "Federal-Aid highway," and finally, a single sub-paragraph differing in substance:

> __. The aforesaid combination and conspiracy consisted of an agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were:
>
> (a) to allocate to Broce Construction Co., Inc.—Project No. __ let by the State of Kansas on _____; and
>
> (b) To submit collusive, noncompetitive, and rigged bids to the State of Kansas in connection with the above-referenced _____ project.
>
> __. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which, as hereinbefore charged, they have combined and conspired to do, including:
>
> (a) Discussing the submission of prospective bids on the above-described project let by the State of Kansas, Project No. _____.
>
> (b) Designating the successful low bidder on the above-referenced public highway construction project;
>
> (c) Submitting intentionally high or complementary bids on the above-referenced _____ project on which Broce Construction Co., Inc. had been designated as the successful low bidder;
>
> (d) Submitting bid proposals on the above-referenced _____ project containing false, fictitious and fraudulent statements and entries; and
>
> (e) _____.

The missing subparagraph (e) in the first indictment contains the significant allegation: "Discussing the submission of prospective bids on other projects let by the State

of Kansas on April 25, 1978." This clearly indicates that the conspiracy prosecuted by the first indictment encompassed more Kansas highway projects than No. 23-60-RS-1080(9). In fact, the "Statement of Facts in Support of Pleas" appended by the government to the plea agreements filed in these cases on February 8, 1982, reveals that the other projects discussed in conjunction with the rigging of bids on Project No. 23-60-RS-1080(9) were *not* all let on the same date, April 25, 1978. Page two of that "Statement of Facts" contains the following sentence:

> James Carlile told defendant, Ray Broce, that he believed that Carlile Asphalt should be the low bidder on the Meade County project [i.e. No. 23-60-RS-1080(9)] and that Broce Construction Co. should be the low bidder on a Gray County project which was going to be let at the *next* State Highway letting.

(emphasis added). Though this "Statement of Facts" is not technically a part of the indictment, it was a part of the record before the court below at the time the guilty pleas were accepted and is the government's own account of what the defendants were admitting by their pleas. It would take a singularly myopic view of the indictment to completely ignore this statement when determining what conspiracy the indictment alleges on its face. Clearly the indictment does *not* state that the conspiracy involved in the rigging of Project No. 23-60-RS-1080(9) concerned *only* that project or even just the April 25, 1978, bid letting, unless we are to presume that the government chose the indictment language in a deliberate attempt to misstate the facts.

Finally, the following quoted paragraph is the key passage of the first indictment which states the essential elements of the crime alleged:

> 11. Beginning sometime in or about April, 1978, *and continuing thereafter, the exact dates being to*



> *this grand jury unknown*, in the District of Kansas, Ray C. Broce, Gerald R. Gumm and Broce Construction Co., Inc., defendants herein, *and others known and unknown*, entered into and engaged in a combination and conspiracy to suppress and eliminate competition for the construction of Project No. 23-60-RS-1080(9) let by the State of Kansas on April 25, 1978, which contract involved construction work on a Federal-Aid highway in the State of Kansas, in unreasonable restraint of the above-described interstate trade and commerce in violation of Title 15, United States Code, Section 1, commonly known as the Sherman Act.

(emphasis added). The second indictment differs only in the following respects:

> 1. The first date is changed from April, 1978, to July, 1979, and the second from April 25, 1978, to July 17, 1979;
>
> 2. The name Gerald R. Gumm does not appear in the second indictment even though the government's "Statement of Facts" clearly indicates that he had an active role in that bid-rigging as well;
>
> 3. Project No. 23-60-RS-1080(9) is replaced by Project No. KRL 29-2(26);
>
> 4. The word "public" is substituted for the first indictment's "Federal-Aid;"
>
> 5. The paragraph is numbered "10."

The portions of the first indictment's version underscored above reveal the vague and indefinite character of the indictments. The indictments state approximate beginning dates for the conspiracies but give no conclusion dates, stating merely that they were "continuing." Nothing in the first indictment would preclude a finding that the conspiracy alleged therein was "continuing" throughout the period encompassed by the second indictment. The indictments do not even specify with

definiteness who was involved in the alleged conspiracies. Nothing would preclude a finding that all of the people participating in the first alleged conspiracy were also participants in the second. And finally, as noted previously, there is nothing in the first indictment to indicate that the agreement and conspiracy decribed therein with regard to Project No. 23-60-RS-1080(9) did not also emcompass other projects and other bid-letting dates. Indeed, nothing in either indictment is definitely inconsistent with the view that the conspiracies they allege are in fact identical, and, further, are identical with the ongoing conspiracy to rig bids, extending over a period exceeding a quarter century, that was found by Judge Saffels in *Beachner*, 555 F.Supp. at 1277-1279.[5]

In contrast, in *Kerrigan v. United States, supra,* 644 F.2d at 48 n. 1 and n. 2, relied upon by the court below, the indictments are much less vague and it is easier to make the case that they do in fact alleged distinguishable conspiracies. First of all, the Kerrigan indictments give a specific month *and date* for both the beginning and the ending of the conspiracies alleged. There is no fudging of the time periods by use of the "exact dates being to this grand jury unknown" language found in both of the present indictments. Further, the time periods alleged for each con-

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[5] It is significant that Judge Saffels in his opinion stated:

> Although witnesses denied any overall agreement or understanding or participation in a single conspiracy, there can be no doubt that bid rigging *was a way of life* in the industry in Kansas. The court cannot imagine that any contractor was not aware of the prevailing practice or unfamiliar with the common jargon and mechanics of rigging a bid.

555 F.Supp. at 1778. In sentencing Mr. Broce, Judge O'Connor below stated:

> Specifically, as to the offenses in question here, though, it would appear that this defendant and this company played a significant role in making big rigging *a way of life* in the highway construction business in this state.

(ROA 201).



spiracy overlap by only one day. Again, there is no vagueness as to who was involved in the *Kerrigan* conspiracies. Although two of the three persons named in the first indictment also were named by the second indictment, there is no catch-all "and others known and unknown" phrase. Lastly, although we do not endorse the view that a difference in overt acts alleged by itself compels a finding that multiple indictments do not violate the double jeopardy clause, *see United States v. Mallah*, 503 F.2d 971, 985 (2nd Cir. 1974), it is pertinent that the *Kerrigan* indictments each refer to the interstate transport of a single lot and type of stolen goods and contain no hints, as the first indictment in the present case does, that other illegal acts were discussed or bargained for in connection with the ones specifically alleged. Based on these considerations, we find, without approving of the result reached by the *Kerrigan* court upon the facts before it, that that case must be distinguished from the present one.

We also are disturbed by the *Kerrigan* court's suggestion that a criminal defendant who pleads guilty to multiple indictments may not "later contest the factual and theoretical foundations of the indictment to which he pleaded, so as to show that, in fact, he committed only a single offense." 644 F.2d at 49. The *Menna* footnote quoted above nowhere mentions that the theoretical or, for that matter, factual *foundations* of an indictment are admitted by a guilty plea. Instead, the *Menna* footnote addresses only the questions of factual *guilt*. Here, indeed, the defendants have admitted the fact that they are guilty of conspiracy to rig highway construction bids – and continue to do so on appeal, but, as in *Menna*, their "claim is that the [government] may not convict [them] no matter how validly [their] factual guilt is established." 423 U.S. at 62, 63 n.2. See *Abney v. United States*, 431 U.S. 651, 659 (1977) ("the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal

issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged.") We decline to believe that their right to raise this question is conditioned by the government's choice of words in its indictments.

This case is more appropriately seen in relation to the following comments made nearly half a century ago in *Short v. United States*, 91 F.2d 614, 624 (4th Cir. 1937):

> Blanket charges of "continuing" conspiracy with named defendants and with "other persons to the grand jurors unknown" fulfill a useful purpose in the prosecution of crime, but they must not be used in such a way as to contravene constitutional guaranties. If the government sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred, and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first. And, if two indictments charging continuing conspiracy and covering the same period in whole or in part are drawn with blanket coverage "with other persons to the grand jurors unknown," a plea of former jeopardy should be submitted to the jury if there is proof that the same partnership in criminal purposes is prosecuted by both, even though the appearance of identity of offenses may have been avoided in the indictment by charging a different place of conspiracy, or by joining additional defendants, or by charging different overt acts, or by charging the violation of additional statutes as being among the objects of the conspiracy. The constitutional provision against double jeopardy is a matter of substance and may not be thus nullified by the mere forms of criminal pleading.



Though we disagree with the *Short* court's indication that the question of double jeopardy is one for a jury to decide, *cf. Pryor v. Rose,* 724 F.2d 525, 528 (6th Cir. 1984), we agree with its view that the government cannot be allowed to evade the Double Jeopardy Clause by using vague indictments, facially distinguishable only by their reference to different overt acts, here, the submission of rigged bids on different construction projects.

In *Sanabria v. United States*, 437 U.S. 54 (1978), the Supreme Court stated:

> "The Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations [can be avoided] by the simple expedient of dividing a single crime into a series of temporal or spatial units," *Brown v. Ohio*, 432 U.S. at 169, or, as we hold today, into "discrete bases of liability" not defined as such by the legislature. See *id.* at 169 n. 8.

437 U.S. at 72. Although *Sanabria* did not involve issues or circumstances strictly comparable to those at hand, the Court's reminder is well taken in the present context. We believe that the *Menna* court never intended to suggest that the Constitution's protection against double jeopardy is such a "fragile guarantee" that it could be taken from a defendant who has pled guilty to an indictment merely because that indictment differs from a previous indictment through the government's purely cosmetic manipulation of the facts alleged.

We hold that where a criminal defendant raises a nonfrivolous claim that he has been haled into court in viola-

tion of the Double Jeopardy Clause on a charge which does not on its face show clearly, indubitably and without any ambiguity that the government's prosection of that charge was constitutionally permissible, that defendant is entitled to a decision on the merits of his double jeopardy claim unless it is demonstrated that he has made an informed and intentional relinquishment specifically of his rights under the Double Jeopardy Clause of the United States Constitution. This right is unaffected by any plea to the challenged charge.

While these cases have been pending before us, we have affirmed Judge Saffels' *Beachner* findings as not clearly erroneous. *United States v. Beachner Const. Co. Inc.*, 729 F.2d 1278 (1984). Judge O'Connor, the trial judge below in the instant cases, sat with us on that appeal. Further highlighting the close connection between these cases and *Beachner*, before Judge O'Connor issued his opinion on the present cases below, both the defendants and the government entered a stipulation into this record that Judge O'Connor could consider, for the purposes of his ruling on the defendants' motion to vacate, the record made by Judge Saffels in the evidentiary hearing on the *Beachner* double jeopardy claim.

Given their broadest interpretation, the findings of fact made in *Beachner* and affirmed by this court would seem to imply that there was never more than one conspiracy engaged in by any Kansas highway contractor. We take the government's stipulation below that the record of the evidentiary hearing in *Beachner* could be used in deciding the motion on the defendants' double jeopardy claims in this case to be an admission that, apart from the issue of the effect of the guilty pleas entered herein, this case does not present a significantly different set of factual circumstances with respect to the actual existence of a Double Jeopardy Clause infringement. Facts therefore now



appearing in this record lead to the conclusion that the defendants have been twice punished for their participation in a single continuing conspiracy. Because their double jeopardy rights have been so violated, the judgment and sentence entered under the second indictment below were illegal and the defendants' Rule 35(a) motion must be granted.

Accordingly, the judgment and sentence entered by the district court on March 15, 1982 in case No. 83-2558 is hereby vacated. There being no contest of the judgment and sentence in case No. 83-2559, that appeal is dismissed.

Judge Seth will file a separate opinion.

**APPENDIX E**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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No. 81-20119-01

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

BROCE CONSTRUCTION CO., INC., ET AL., DEFENDANTS.

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No. 82-20011-01

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

BROCE CONSTRUCTION CO., INC., ET AL., DEFENDANTS.

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[Filed: Nov. 18, 1983]

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**MEMORANDUM AND ORDER**

This matter is presently before the court on the defendants' motion, pursuant to Fed. R. Crim. P. 35(a), to vacate the judgment and sentence of the court entered March 15, 1982, in Case No. 82-20011-01, on the ground that the judgment and sentence constitute a violation of the double jeopardy clause of the Fifth Amendment of the United States Constitution.

**Background**

On November 17, 1981, the defendants were charged by a two-count indictment in Case No. 81-20119-01, for violations of federal antitrust laws (15 U.S.C. §1)



and the mail fraud statute (18 U.S.C. §1341) relating to State of Kansas Highway Project No. 23-60-RS-1080(9) let by the state of Kansas on April 25, 1978. Count One of the indictment, concerning the antitrust charge, alleged in part as follows:

> Beginning sometime in or about April, 1978, and continuing thereafter, the exact dates being to this grand jury unknown, in the District of Kansas, Ray C. Broce, Gerald R. Gumm and Broce Construction Co., Inc., defendants herein, and others known and unknown, entered into and engaged in a combination and conspiracy to suppress and eliminate competition for the construction of Project No. 23-60-RS-1080(9) let by the State of Kansas on April 25, 1978, which contract involved construction work on a Federal-Aid highway in the State of Kansas, in unreasonable restraint of the above-described interstate trade and commerce in violation of Title 15, United States Code, Section 1, commonly known as the Sherman Act.

Count Two of the indictment, concerning the mail fraud charge, alleged in part:

> Beginning sometime in or about April, 1978, and continuing thereafter, the exact dates being to this grand jury unknown, in the District of Kansas, Ray C. Broce, Gerald R. Gumm and Broce Construction Co., Inc., defendants herein, and others known and unknown, devised and intended to devise a scheme and artifice to defraud the State of Kansas and the United States of America . . .

On February 4, 1982, the defendants were charged in a second indictment, Case No. 82-20011-01, with a one-count violation of the antitrust laws relating to another Kansas highway project. The indictment alleged, in part:

> Beginning sometime in or about July, 1979, and continuing thereafter, the exact dates being to this grand jury unknown, in the District of Kansas, Ray

C. Broce and Broce Construction Co., Inc., defendants herein, and others known and unknown, entered into and engaged in a combination and conspiracy to suppress and eliminate competition for the construction of Project No. KRL 29-2(26) let by the State of Kansas on July 17, 1979, which contract involved construction work on a public highway in the State of Kansas, in unreasonable restraint of the above-described interstate trade and commerce in violation of Title 15, United States Code, Section 1, commonly known as the Sherman Act.

On February 8, 1982, defendant Broce Construction Co., Inc., entered a plea of guilty to the antitrust charge in Case No. 81-20119-01 and the antitrust charge in Case No. 82-20011-01. Defendant Ray C. Broce entered pleas of guilty to both counts in Case No. 81-20119-01, and to the one-count antitrust charge in Case No. 82-20011-01.

The defendants appeared before this court for sentencing on March 15, 1982. The court sentenced defendant Broce Construction Co., Inc., to a fine of $750,000.00 on the antitrust count in Case No. 81-20119-01, and $750,000.00 on the antitrust count in Case No. 82-20011-01. In Case No. 81-20119-01, defendant Ray C. Broce was sentenced to two years imprisonment and a $50,000.00 fine on the antitrust count, and to two years imprisonment, concurrent with the antitrust count, and a $1,000.00 fine on the mail fraud count. In Case No. 81-20011-01, Mr. Broce was also sentenced to two years imprisonment, concurrent with the sentence in Case No. 81-20119-01, plus a $50,000.00 fine. Defendant Ray C. Broce paid his personal fines on June 2, 1982. Defendant Broce Construction Co., Inc., paid $500,000.00 of its fine on December 30, 1982. Mr. Broce began serving his sentence on May 3, 1982, and is presently imprisoned. At no time prior to the filing of the present motion have the defendants raised a claim that their sentences were in violation of the double jeopardy clause.



The defendants' recent double jeopardy claim was inspired by the January 31, 1983 Memorandum and Order by Judge Dale E. Saffels of this court, in another case involving bidrigging in Kansas highway construction projects, *United States v. Beachner Construction Co., Inc., et al.*, No. 82-20076-01. Beachner Construction Co., Inc., was indicated on February 4, 1982, for a violation of the Sherman Antitrust Act and a mail fraud violation. Both charges related to a Kansas highway project let by the state of Kansas on February 7, 1980. Robert Beachner was subsequently indicted for the same alleged offenses. The case proceeded to trial on May 3, 1982 ("*Beachner I*"). By a verdict rendered on May 7, 1982, a jury acquitted both defendants of the conspiracy and mail fraud charges.

On November 16, 1982, another indictment was returned by the grand jury, naming Beachner Construction Co., Inc., and Jerry Beachner as defendants. This indictment ("*Beachner II*") contained three counts alleging violations of §1 of the Sherman Act, and three counts alleging mail fraud violations. Judge Saffels found the *Beachner I* and *Beachner II* indictments to be identical, with the exception that *Beachner II* named Jerry Beachner rather than Robert Beachner, and that *Beachner II* specified three different highway projects.

In *Beachner II*, Beachner Construction Co., Inc., moved to dismiss the November 16, 1982 indictment, alleging *inter alia* double jeopardy and collateral estoppel. Following an evidentiary hearing, the court entered its January 31, 1983 Memorandum and Order, in which it concluded that the conspiracies charged in *Beachner I* and *Beachner II* were merely separate parts of a single larger and ongoing bid-rigging conspiracy that had been continuing for several years. Accordingly, Judge Saffels granted Beachner Construction Co., Inc.'s motion to dismiss.

**Discussion**

The defendants in the instant case, Broce Construction Co., Inc., and Ray C. Broce, contend that in light of Judge Saffels' decision in *Beachner II*, the judgment and sentence in Case No. 82-20011-01 constitutes a violation of the double jeopardy clause because it sentenced the defendants on two separate highway projects, as separate conspiracies, although they were both part of a single overall conspiracy to rig bids on Kansas highway construction projects. In addition, Broce Construction Co., Inc., contends that the total of 1.5 million dollars in fines imposed by the court was illegal because it exceeded the legal penalty of one million dollars per violation, as prescribed by 15 U.S.C. §1.

The defendants contend that in light of Judge Saffels' *Beachner II* ruling, they were guilty of only one bid-rigging offense—a single conspiracy—rather than two. The defendants thus allege that the sentence imposed by the court violates the double jeopardy clause on the ground of multiplicity in that it punishes them twice for a single offense.

It is certainly clear that the double jeopardy clause does protect a defendant against multiplicity of punishment. In *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969), the Court stated:

> That guarantee [against double jeopardy] has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. *And it protects against multiple punishments for the same offense.* . . .
> (Footnotes omitted) (emphasis added).

The defendants thus contend that they should be entitled to take advantage of Judge Saffels' *Beachner II* ruling because a Rule 35(a) motion can be raised "at any



time." Although it is the general rule that a Rule 35(a) motion can be raised at any time [*Heflin v. United States*, 358 U.S. 415 (1959); *United States v. Golay*, 560 F.2d 866, 870 (8th Cir. 1977)], the government argues that the defendants waived their double jeopardy claim because it was not timely raised and because the defendants pleaded guilty to two separate conspiracies. The issue in the case is therefore whether a plea of guilty to counts alleging two separate conspiracies constitutes a waiver of a claim of double jeopardy on the ground that the defendants are being subjected to multiple punishment for a single offense.

The leading case on the question whether a guilty plea waives a claim of double jeopardy is *Menna v. New York*, 423 U.S. 61 (1975) (*per curiam*). The defendant in that case refused to answer grand jury questions and refused to obey a court order to testify before the grand jury. He was held in contempt of court and was sentenced to a 30-day term. Upon his release from serving the contempt sentence, the defendant was indicated for his earlier refusal to answer questions before the grand jury. He argued unsuccessfully that the indictment should be dismissed as a violation of the double jeopardy clause of the Fifth Amendment. When this argument was rejected, the defendant pleaded guilty to the indictment and was sentenced on the basis of that plea. The defendant then resurrected his double jeopardy claim on appeal, but the New York Court of Appeals affirmed the conviction, holding that the double jeopardy claim had been waived by the defendant's plea of guilty. The United States Supreme Court granted certiorari and held that the defendant had not waived his double jeopardy claim. The Court stated:

> a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient

basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim. (Emphasis in original.)

We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute. (Emphasis added.)

*Id.* at 62-63, n.2 (emphasis in original).

In *Menna*, even though the defendant's guilty plea admitted the facts of his offense, the indictment—*on its face*—arguably violated the double jeopardy clause by charging him a second time for the conduct that was the subject of his previous contempt conviction. Thus, the defendant's double jeopardy claim was not rendered irrelevant by his guilty plea because the indictment *on its face* sought to punish the same conduct, thereby giving rise to a possible double jeopardy violation. In contrast, the challenged second indictment in the instant case (No. 82-20011-01) does not *on its face* seek to punish the defendants for the same conduct for which they were charged in the previous indictment (No. 81-20119-01). *Menna* left unanswered the question of whether a plea of guilty to one or more counts not multiplicious on their face constitutes a waiver of a claim of double jeopardy.

Our research reveals that few courts have squarely confronted this question left unanswered by the Supreme Court in *Menna*. Although the defendants have cited two broadly-worded opinions for the proposition that a guilty



plea does not constitute a waiver of a double jeopardy claim, *United States v. Broussard*, 645 F.2d 504 (5th Cir. 1981); *Launius v. United States*, 575 F.2d 770 (9th Cir. 1978), neither of these cases involved a plea of guilty to an indictment or information that was not multiplicious on its face. In other words, the cases cited by the defendants are entirely within the scope of the rule announced in *Menna*.

The defendants point out that there is broad language in the *Launius* opinion to the effect that a waiver of a double jeopardy claim must be a " 'waiver' as defined in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)—the intentional relinquishment or abandonment of a known right or privilege." 575 F.2d at 772. The government, in response, has cited to a line of cases in the Eighth and Second Circuits to the effect that a claim of double jeopardy is non-jurisdictional and is waived if not timely and affirmatively pleaded. *United States v. Herzog*, 644 F.2d 713, 716 (8th Cir. 1981); *McClain v. Brown*, 587 F.2d 389, 391 (8th Cir. 1978); *United States v. Perez*, 565 F.2d 1227, 1232 (2d Cir. 1977). The Tenth Circuit apparently had not addressed the question of waiver of a double jeopardy claim. We are not convinced, however, that the waiver theories announced in either *Launius* or the *Herzog* line of cases should be applied to the facts of the instant case.

We believe that the resolution of the pending motion should be controlled by the opinion in *Kerrigan v. United States*, 644 F.2d 47 (1st Cir. 1981), which more closely resembles the facts and the resulting legal issues of the matter at bar than does any other case cited by the parties or uncovered by the court's research. Kerrigan was indicted in two separate indictments by a federal grand jury. The first indictment charged that Kerrigan conspired with others, between August 25, 1977, and September 1, 1977, to transport and to sell stolen lithographs. The sec-

ond indictment charged that Kerrigan conspired with one of his previous co-conspirators, between September 1, 1977, and September 22, 1977, to transport and to sell stolen Indian jewelry. The second indictment also charged Kerrigan with a substantive count of transporting the stolen jewelry in interstate commerce. Kerrigan pleaded guilty to the two conspiracy charges, each before a different judge, and in exchange the government dismissed the substantive count. On March 15, 1978, Kerrigan was sentenced to three years for the jewelry conspiracy and two years (consecutively) for the lithograph conspiracy. After his sentencing, Kerrigan challenged the two-year sentence on the ground that the two charges involved parts of a single conspiracy. The district court adopted the magistrate's finding that the indictments charged separate conspiracies, and rejected Kerrigan's challenge to his sentence.

On appeal, Kerrigan again asserted that there was only one conspiracy and argued, relying on *Menna* and *Launius*, that his guilty plea did not waive his right to raise the double jeopardy claim. In the opinion for the First Circuit, Judge Campbell discussed *Menna* and *Launius* at some length.

> *Menna* and *Launius* do indeed indicate that a double jeopardy claim may lie notwithstanding a guilty plea, but in neither case did the double jeopardy claim depend upon a repudiation of the allegations in the indictment to which the plea had been entered. These cases do not hold, as Kerrigan suggests, that a defendant who pleaded guilty may later contest the factual and theoretical foundations of the indictment to which he pleaded, so as to show that, in fact, he committed only a single offense. The court in *Launius* explicitly and correctly stated that "By pleading guilty appellants admitted the facts alleged in the information." [Citations omitted]. Kerrigan's claim of double jeopardy must be evaluated under the version of facts stated in the indictment, not against an alternative version of events which Kerrigan now claims is more accurate. Evaluated in this way, Kerrigan's claim is quite different from that asserted in *Launius*; far from being facially multiplicitous, as in *Launius*, Kerrigan's indictments sufficiently described two separate and distinct offenses, for which Kerrigan could be constitutionally sentenced to two separate terms of imprisonment.
>
> 644 F.2d at 49.



Judge Campbell concluded that:

> the two agreements charged related to commission of crimes which were similar but distinct. Thus, facially, it is possible to have had two conspiracies. . . . By pleading guilty, Kerrigan accepted the government's two-conspiracy allegations, and it is too late for him to try to establish something else. The factual allegations of the indictments sufficiently charge two separate conspiracies; Kerrigan is bound by these facts because of his guilty pleas; and Kerrigan has therefore not been twice placed in jeopardy for the same offense.

*Id.*

The similarity between the facts of the case now at bar and those of *Kerrigan* is inescapable. Defendants Ray C. Broce and Broce Construction Co., Inc., pleaded guilty to two separate indictments alleging different conspiracies beginning at different times (more than one year apart) and involving different construction projects. On their faces, the indictments alleged two distinct criminal conspiracies, and the defendants pleaded guilty to each, acknowledging the validity of the facts contained in each indictment. Accordingly, we feel compelled to adopt the First Circuit's reasoning that the defendants "accepted the

government's two-conspiracy allegations, and it is too late for [them] to try to establish something else." 644 F.2d at 49.

There remains, however, the defendants' suggestion that, notwithstanding their pleas of guilty, Judge Saffels' subsequent ruling in *Beachner II*, that there was only one agreement among Kansas contractors to rig bigs, rendered their sentences invalid and that it now "appears from the face of the indictments that but one conspiracy existed for which defendants have been twice punished." (Defendant's Reply, at 9.) In support of this theory that an intervening court decision can merge the contents of previous indictments alleging two conspiracies into a single conspiracy, the defendants cite *Smith v. United States*, 287 F.2d 270 (9th Cir. 1961).

In *Smith*, the defendant pleaded guilty to a three-count information arising out of a bank robbery. Each count charged the defendant with violating a different subsection of 18 U.S.C. §2113. After the defendant was sentenced, the Supreme Court of the United States, in another case, held that the subdivisions of 18 U.S.C. §2113 charged but one offense and that the imposition of more than one sentence was illegal. As a result, the defendant's sentence was corrected.

We are not persuaded that this line of reasoning is applicable here. *Smith v. United States* is distinguishable from the situation at bar in that the intervening decision in that case involved a question of *law*: the operation of a statute. Consequently, the Supreme Court's decision was applicable to Smith's case. Judge Saffels' finding of a single conspiracy in *Beachner II*, however, was a *factual* determination made in light of the evidence produced at an evidentiary hearing in that particular case. It is well settled that the question whether a single conspiracy or multiple conspiracies exist is a question of fact. *United States v. Elam*, 678 F.2d 1234, 1245 (5th Cir. 1982); *United States*



*v. James*, 576 F.2d 1121, 1126 (5th Cir. 1978); *United States v. Armedo-Sarmiento*, 545 F.2d 785, 789 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977); *United States v. Ippolito*, 509 F.Supp. 1205, 1208 (E.D. N.Y. 1981). Accordingly, we do not believe that at this late date the defendants should be permitted to take advantage of a factual determination that is inconsistent with the facts the defendants admitted in pleading guilty to the indictments alleging two separate conspiracies.

We do not agree with the defendants' allegation that "[t]he position of the government would effectively deprive any defendant who pleads guilty of the right to file a Rule 3[5] motion which specifically preserves this right to those who plead guilty." (Defendants' Reply, at 10.) We hold merely that where a defendant by pleading guilty admits facts that do not give rise to a double jeopardy claim, he will not later be permitted to raise a double jeopardy claim that depends upon a version of the facts different from that he has admitted.

IT IS THEREFORE ORDERED that defendants' motion to vacate be and hereby is denied. The clerk is directed to transmit copies of this Memorandum and Order to defense counsel, the Office of the Antitrust Division of the Department of Justice, and the Office of the United States Attorney.

Dated this 18th day of November, 1983, at Kansas City, Kansas.

/s/ EARL E. O'CONNOR
Earl E. O'Connor
Chief Judge

**APPENDIX F**

Nos. 86-2166 and 86-2202

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

*v.*

RAY C. BROCE AND RAY C. BROCE CONSTRUCTION CO., INC., DEFENDANTS-APPELLEES.

September Term – November 13, 1987.

Before the Honorable William J. Holloway, Jr., Chief Judge, Honorable Monroe G. McKay, Honorable James E. Barrett, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Bobby R. Baldock, and Honorable William H. Timbers,* Circuit Judges.

This matter comes on for consideration of plaintiff-appellant's petition for rehearing, with suggestion for rehearing en banc in the captioned appeal.

Upon consideration of the merits of the petition for rehearing, the petition is denied by the panel to whom the case was submitted. Judge Barrett voted to grant the petition for rehearing.

The petition for rehearing having been denied by the panel to whom the case was submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Fed. R. App. P. 35, the suggestion for rehearing en banc is denied.



Judge Tacha did not participate in consideration of the suggestion for rehearing en banc.

/s/ ROBERT L. HOECKER

Robert L. Hoecker
Clerk

**APPENDIX G**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

---

Criminal Nos. 81-20119-01 and 82-20011-01

UNITED STATES OF AMERICA

*v.*

BROCE CONSTRUCTION CO., INC., ET AL., DEFENDANTS

---

[Filed: Feb. 8, 1982]

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**PLEA AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND DEFENDANT RAY C. BROCE**

The United States of America, by its attorneys, acting with the authorization of the Assistant Attorney General in charge of the Antitrust Division, United States Department of Justice, and the defendant, Ray C. Broce, by his own person and by his attorney, hereby enter into the following plea agreement pursuant to Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure.

1. Defendant, Ray C. Broce, will plead guilty to the Indictment in this case and to the Indictment, Criminal No. 82-20011-01 charging him with a violation of 15 U.S.C. § 1 in connection with Project No. KRL 29-2(26) let by the State of Kansas on July 17, 1979.

2. Defendant, Ray C. Broce, will cooperate with the government in existing and further investigations of violations of federal law by the Antitrust Division and the United States Attorneys. Defendant understands that such cooperation must be truthful, and defendant understands the consequences of the offenses of perjury (18 U.S.C. § 1621) and making false declarations in grand jury or court proceedings (18 U.S.C. § 1623).



3. Defendant, Ray C. Broce, understands that the maximum sentence under the Sherman Act, 15 United States Code, Section 1, on each count to which he has agreed to plead guilty, is a fine of $100,000 and incarceration for a period of three years; and further understands that the maximum sentence under the Mail Fraud Statute, 18 United States Code, Section 1341 is a fine of $1,000 and incarceration for a period of five years. Defendant further understands that the sentences on each of the counts in the Indictments could be imposed consecutively. With respect to the sentence, the government will recommend to the Court that a period of incarceration to be determined by the Court is the appropriate disposition of this case. Defendant recognizes that the government's sentencing recommendation is not binding on the Court. The government agrees to call defendant's cooperation to the attention of the Court, and to request that the Court recommend to the Bureau of Prisons that any period of incarceration be served at an institution to be identified at the time of sentencing. The Government agrees to recommend that any period of incarceration be served prior to the commencement of any period of incarceration imposed on co-defendant Gerald R. Gumm.

4. Defendant reserves the right to make any arguments he wishes at the time of the sentencing including bringing to the Court's attention any facts in mitigation. However, the government also reserves the right to bring to the Court's attention any facts it wishes in aggravation to justify its sentencing recommendation.

5. The government agrees that it will not further prosecute defendant for or on account of any collusion between defendant and other contractors regarding any other highway, street or airport runway construction projects let by awarding authorities within the States of Kansas and Oklahoma prior to the date of this agreement.

6. The government and defendant enter into this agreement with knowledge of the plea agreements between the government and the other defendants in this case, Broce Construction Co., Inc. and Gerald R. Gumm. Other than in those plea agreements, the government has made no other promises to or agreements with the defendant.

DATED:

/s/ RAY C. BROCE
Ray C. Broce

/s/ RICHARD J. BRAUN
Richard J. Braun

/s/ ROBERT TILTON
Robert Tilton, ESQ.
Tilton, Dillon, Beck & Crockett
1324 Topeka Blvd.
Topeka, Kansas
Attorney for Defendant
Ray C. Broce

/s/ ROBERT V. ALLEN
Robert V. Allen
Attorneys, Department of Justice
Room 2634, Everett M. Dirksen Bldg.
Chicago, Illinois 60604
Phone: 312-353-6685



**STATEMENT OF FACTS IN SUPPORT OF PLEAS**

In early April, 1978, the State of Kansas, Department of Transportation advertised for bids on a resurfacing project in Meade County, Kansas. The Meade County project was a federal aid secondary project, 70% funded by the Federal Highway Trust Fund. On April 25, 1978, the following bids were submitted in the project:

| | |
|---|---|
| Broce Construction Co. | $1,072,684.15 |
| Carlile Asphalt Co. | $1,083,120.65 |
| Prairie States Const. Co. | $1,100,167.90 |
| Siebert Sand Co. | $1,110,221.00 |
| Popejoy Construction Co. | $1,110,788.81 |

On April 24, 1978, on the night prior to the day for submission of bids, defendant, Gerald Gumm, approached Ronald Siebert, President of Siebert Sand Co., and Siebert told Gumm that he (Siebert) was trying to set up a Cheyenne County project on the same letting to insure that he would be the low bidder, and asked Gumm to submit a complementary bid on the Cheyenne County project. In the same conversation Gumm told Siebert that Broce Construction Co. was attempting to set up the Meade County project, and asked Siebert to submit a complementary bid on the Meade County job. Siebert gave Gumm a number to stay above on the Cheyenne County project and Gumm provided Siebert with a number to stay above on the Meade County project.

Defendant, Gerald Gumm, then approached Donald Popejoy, President of Popejoy Construction Co., and asked Popejoy whether his company was interested in the Meade County project. Popejoy told Gumm that he (Popejoy) was not very interested in the job and showed Gumm the number which Popejoy Construction Co. intended to bid on the project, which was higher than the amount Broce Construction Co. intended to bid. Gumm asked Popejoy to submit his bid in that amount on the project. Popejoy stated that he would.

Defendant, Gerald Gumm, then approached Edward Berry, General Superintendent of Prairie States Construction Co., and asked Berry to submit a complementary bid on the Meade County project. Berry showed Gumm the number he intended to bid, which was already higher than the amount Broce Construction Co. intended to bid on the project. Gumm asked Berry to turn his bid in and Berry stated that he would do so.

Defendant, Ray Broce, learned that Carlile Asphalt Co. was interested in the Meade County project. Defendant, Broce, approached James Carlile of Carlile Asphalt Co., and attempted to talk Carlile out of bidding competitively on the Meade County project. James Carlile told defendant, Ray Broce, that he believed that Carlile Asphalt should be the low bidder on the Meade County project and that Broce Construction Co. should be the low bidder on a Gray County project which was going to be let at the next State Highway letting. Defendant, Broce told Carlile that that arrangement was unacceptable to Broce Construction Co. and suggested instead that Carlile take a Seward County project on the April 25, 1978 letting in return for Broce getting the Meade County project. Defendant, Broce said that he would talk to Carlile about the Gray County project at the next letting. After a substantial amount of discussion, James Carlile agreed to let Broce Construction Co. have the Meade County project in return for the Seward County project.

After defendant, Broce's conversation and agreement with James Carlile, Gerald Gumm approached James Carlile and gave Carlile a number to bid above on the Meade County project. Carlile stated that he wanted Carlile Asphalt Co. to be the second low bidder on the Meade County project and Gumm stated a number at which Carlile should be in order to be second low bidder on the project. Carlile then gave Gumm a number to stay



above on the Seward County project. Carlile Asphalt Co. had to raise its proposed bid to get above the number provided by defendant, Gerald Gumm.

The State warrant, which is the subject of Count 2 of the Indictment, was mailed to Broce Construction Co. as a result of the agreements described above. Various construction materials, including guardrail, essential to the completion of the Meade County project were shipped in interstate commerce from states other than Kansas to the job site for use in construction of the Meade County project by Broce Construction Co.

In late June, 1979, the State of Kansas, Department of Transportation, advertised for bids on a State of Kansas funded project in Barton County, Kansas. On July 17, 1979, the State received the following bids on the Barton County project:

| | |
|---|---|
| Broce Construction Co. | $1,639,968.55 |
| Venture Corporation | $1,659,936.26 |
| Siebert Sand Co. | $1,737,447.75 |

On July 16, 1979, on the night prior to the day for submission of bids, defendant, Ray Broce, president and principal owner of Broce Construction Co., contacted Orville Spray, Jr., president of Venture Corporation, at the Ramada Inn in Topeka, Kansas. In that conversation with Orville Spray, Jr. defendant Broce stated that he wanted Broce Construction Co. to have the Barton County job. Orville Spray, Jr. told Broce that he also wanted the job for Venture Corporation. After an hour or two of discussion with defendant, Ray Broce, Orville Spray, Jr. finally agreed to let Broce Construction Co. be the low bidder on the Barton County job in return for either $75,000 or some subcontract work on the Barton County job.

After his conversation with defendant, Ray Broce, Orville Spray, Jr., was approached by Gerald Gumm, general manager of Broce Construction Co., who told

Spray the number Venture Corporation should bid on the project in order to have Venture Corporation's bid be higher than that of Broce Construction Co. Spray stated that he would submit a bid in that amount.

About a week after the letting on July 17, 1979, Orville Spray, Jr. flew to Dodge City, Kansas, and met with defendant, Ray Broce and Gerald Gumm. Neither defendant Roy Broce nor Gerald Gumm recalls this airport meeting in Dodge City. Spray stated that he would take the $75,000 instead of the subcontract and arrangements were made between Spray and defendant, Broce for Broce Construction Co. to purchase approximately 30,000 tons of sand for the Barton County project at a price one dollar higher than the market price for such sand, and for Venture Corporation to submit to Broce Construction Co. non-legitimate equipment rental invoices for a loader for nine months at $5,000 per month to obtain payment of a total of $75,000 from Broce Construction Co. to Venture Corporation. The agreed upon arrangements were thereafter carried out in full.

Guardrail and wooden posts utilized on the project and essential to the completion of the project, were shipped from sources outside the State of Kansas to the job site for use in the construction of the project. The value of these items was in excess of $7,000.



**APPENDIX H**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

---

Criminal Nos. 81-20119-01 and 82-20011-01

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

BROCE CONSTRUCTION CO., INC., ET AL., DEFENDANTS

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[Filed: Feb. 8, 1982]

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**PLEA AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND DEFENDANT BROCE CONSTRUCTION CO., INC.**

The United States of America, by its attorneys, acting with the authorization of the Assistant Attorney General in charge of the Antitrust Division, United States Department of Justice, and the defendant, Broce Construction Co., Inc., by its attorney and by an officer, hereby enter into the following plea agreement pursuant to Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure.

1. Defendant, Broce Construction Co., Inc., will plead guilty to Count One of the Indictment in this case and to the Indictment, Criminal No. 82-20011-01, charging it with a violation of 15 U.S.C. § 1 in connection with Project No. KRL 29-2(26) let by the State of Kansas on July 17, 1979.

2. Defendant, Broce Construction Co., Inc., will cooperate with the government in existing and further investigations of violations of federal law by the Antitrust Division and the United States Attorneys. Defendant will advise those officers and agents, who may fulfill its obligation to cooperate in the government's investigations, of the consequences of the offenses of perjury (18 U.S.C. § 1621) and making false declarations in grand jury or court proceedings (18 U.S.C. § 1623).

3. Defendant, Broce Construction Co., Inc., understands that the maximum sentence under the Sherman Act, 15 United States Code, Section 1, on each count to which it has agreed to plead guilty, is a fine of $1,000,000. With respect to the sentence, the government has agreed to recommend to the Court a fine in the amount of $1,500,000. Defendant recognizes that the government's sentencing recommendation is not binding on the Court. The government agrees that it will not oppose a request by defendant to pay one-third of the fine by December 31, 1982, another one-third of the fine by December 31, 1983, and the remaining one-third of the fine by December 31, 1984. The government agrees to dismiss the remaining Count of the Indictment at the time of sentencing.

4. The government agrees to call the defendant's cooperation to the attention of the Court. Defendant reserves the right to make any arguments it wishes at the time of the sentencing including bringing to the Court's attention any facts in mitigation. However, the government also reserves the right to bring to the Court's attention any facts it wishes in aggravation to justify its sentencing recommendation.

5. The government agrees that it will not further prosecute defendant, its officers or employees for or on account of any collusion between defendant and other contractors regarding any other highway, street or airport runway



construction projects let by awarding authorities within the States of Kansas and Oklahoma prior to the date of this agreement.

6. The government and defendant enter into this agreement with knowledge of the plea agreements between the government and the other defendants in this case, Ray C. Broce and Gerald R. Gumm. Other than in those plea agreements, the government has made no other promises to or agreements with the defendant.

DATED:

/s/ RICHARD J. BRAUN
Richard J. Braun

/s/ ROBERT V. ALLEN
Robert V. Allen
Attorneys, Department of Justice
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Chicago, Illinois 60604
Phone: 312-353-6685

/s/ RAY C. BROCE
Broce Construction Co., Inc.
Dodge City, Kansas

/s/ KENNETH F. CROCKETT
Kenneth F. Crockett, ESQ.
Tilton, Dillon, Beck & Crockett
1324 Topeka Blvd.
Attorney for Defendant
Broce Construction Co., Inc.

**APPENDIX I**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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Criminal No. 82-20011

UNITED STATES OF AMERICA

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.,
DEFENDANTS

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[Filed: Feb. 4, 1982]

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**INDICTMENT**

The Grand Jury charges:

**I**
**DEFINITIONS**

1. As used herein, the term:

(a) "Highway construction" means the construction, reconstruction, building or rebuilding of public roads within the State of Kansas, including, but not limited to, the building or construction of bridges, grade separation structures, concrete or asphalt paving, and the earth moving and culverting performed in connection therewith; and

(b) "Highway construction contractor" means any business or legal entity engaged, directly or indirectly, in highway construction.



**II**
**DEFENDANTS**

2. Ray C. Broce is president of Broce Construction Co., Inc. Broce Construction Co., Inc. is a corporation organized and existing under the laws of the State of Kansas with its principal place of business in Dodge City, Kansas. During the period of time covered by this Indictment, Ray C. Broce and Broce Construction Co., Inc. have engaged in the highway construction business within the State of Kansas.

3. Whenever in this Indictment reference is made to any act, deed or transaction of any corporation, such allegation shall be deemed to mean that such corporation engaged in such act, deed or transaction by or through its officers, directors, agents, employees or representatives while they were actively engaged in the management, direction, control or transaction of its business or affairs.

**III**
**CO-CONSPIRATORS**

4. Various persons and firms, not made defendants herein, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

**IV**
**TRADE AND COMMERCE**

5. Public highways, including the highway which is the subject of this Indictment, are part of a nationwide network of interconnecting highways over which motor vehicles move in a continuous and uninterrupted stream of interstate commerce from and through one state to another. A substantial amount of the nation's goods move in interstate commerce over these highways via truck transportation.

6. During the period of time covered by this Indictment, the Kansas Department of Transportation invited highway construction contractors to submit sealed competitive bids on highway construction projects. Such invitations are known as highway lettings and occur approximately eight times per year in Topeka, Kansas. The State of Kansas awards contracts to the lowest responsible bidder following the opening of the sealed bids by its Department of Transportation.

7. During the period of time covered by this Indictment, there was in effect a State of Kansas law which governed the awarding of public highway construction projects by the Kansas Department of Transportation. That statute provided in part:

> 68-410. All contracts for the construction, improvement, reconstruction, and maintenance of the highway system, the cost of which exceeds one thousand dollars ($1,000), except contracts between the secretary of transportation and the various counties, shall be awarded at a public letting to the lowest responsible bidder . . . .

8. During the period of time covered by this Indictment, the State of Kansas required each bidder on public highway projects to execute a bid proposal providing in part:

> In submitting this bid, the undersigned declares that they are the only person interested in the said bid; that it is made without any connection with any person or persons making another bid for the same contract; that the bid is in all respects fair and without collusion, fraud or misrepresentation.

9. During the period of time covered by this Indictment, there was a substantial, continuous and uninterrupted flow of steel, asphalt cement and other essential materials from suppliers outside of the State of Kansas to



the job sites within the State for use by highway construction contractors in the construction of public highways, including the job site of the project which is the subject of this Indictment. The activities of the defendants and co-conspirators, which are the subject of this Indictment, were within the flow of, and substantially affected, interstate commerce.

## V
## OFFENSE CHARGED

10. Beginning sometime in or about July, 1979, and continuing thereafter, the exact dates being to this grand jury unknown, in the District of Kansas, Ray C. Broce and Broce Construction Co., Inc., defendants herein, and others known and unknown, entered into and engaged in a combination and conspiracy to suppress and eliminate competition for the construction of Project No. KRL 29-2(26) let by the State of Kansas on July 17, 1979, which contract involved construction work on a public highway in the State of Kansas, in unreasonable restraint of the above-described interstate trade and commerce in violation of Title 15, United States Code, Section 1, commonly known as the Sherman Act.

11. The aforesaid combination and conspiracy consisted of an agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were:

(a) To allocate to Broce Construction Co., Inc. Project No. KRL 29-2(26) let by the State of Kansas on July 17, 1979; and

(b) To submit collusive, noncompetitive, and rigged bids to the State of Kansas in connection with the above-referenced public highway construction project.

12. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which, as hereinbefore charged, they have combined and conspired to do, including:

(a) Discussing the submission of prospective bids on the above-described project let by the State of Kansas, Project No. KRL 29-2(26);
(b) Designating the successful low bidder on the above-referenced public highway construction project;
(c) Submitting intentionally high or complementary bids on the above-referenced public highway construction project on which Broce Construction Co., Inc. had been designated as the successful low bidder;
(d) Submitting bid proposals on the above-referenced public highway construction project containing false, fictitious and fraudulent statements and entries; and
(e) Discussing the payment of consideration of value to another contractor to induce that contractor to submit a noncompetitive, rigged bid on the above-referenced public highway construction project.

**VI**
**EFFECTS**

13. The aforesaid combination and conspiracy charged herein has had the following effects, among others:

(a) Prices for the public highway construction project referred to in paragraph 10 of this indictment have been fixed, maintained, and established at artificial and noncompetitive levels;



(b) Competition for the above-referenced public highway construction project has been restrained, suppressed, and eliminated;
(c) The State of Kansas has been denied the right to receive sealed competitive bids for the above-referenced public highway construction project; and
(d) The State of Kansas has been denied the benefits of free and open competition for the above-referenced public highway construction project.

**VII**
**JURISDICTION AND VENUE**

14. The aforesaid combination and conspiracy was formed and carried out, within the District of Kansas and within the jurisdiction of this Court. The aforesaid combination and conspiracy was carried out within five years preceding the return of this Indictment.

A TRUE BILL

DATED:

/s/ RICHARD J. BRAUN
Richard J. Braun

/s/ ROBERT B. ALLEN
Robert V. Allen
Attorneys, Department of Justice
Room 2634, Everett M. Dirksen Bldg.
Chicago, Illinois 60604
Phone: 312-353-6685

FOREMAN

/s/ WILLIAM F. BAXTER
William F. Baxter
Assistant Attorney General

/s/ JOSEPH H. WIDMAR
Joseph H. Widmar
Attorney, Department of Justice

/s/ JIM J. MARQUEZ
Jim J. Marquez
United States Attorney For The
District of Kansas

(It is requested that trial be held in the City of Kansas City, Kansas).

Bond fixed at: $_____

_____
United States District Court Judge



**APPENDIX J**

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Criminal No. 81-20119-01

UNITED STATES OF AMERICA

*v.*

BROCE CONSTRUCTION CO., INC.,
RAY C. BROCE, AND GERALD R. GUMM, DEFENDANTS

[Filed: Nov. 17, 1981]

**INDICTMENT**

The Grand Jury charges:

**COUNT ONE**
**I**
**DEFINITIONS**

1. As used herein, the term:
   (a) "Highway construction" means the construction, reconstruction, building or rebuilding of public roads within the State of Kansas, including, but not limited to, the building or construction of bridges, grade separation structures, concrete or asphalt paving, and the earth moving and culverting performed in connection therewith;

(b) "Highway construction contractor" means any business or legal entity engaged, directly or indirectly, in highway construction; and

(c) "Federal-Aid highways" means highway construction on public highways partially financed by the federal government in accordance with the terms and conditions of Title 23 of the United States Code, Sections 101 *et seq.*, commonly known as the Federal-Aid Highway Act.

## II
## DEFENDANTS

2. Ray C. Broce is president and Gerald R. Gumm is general manager of Broce Construction Co., Inc. Broce Construction Co., Inc. is a corporation organized and existing under the laws of the State of Kansas with its principal place of business in Dodge City, Kansas. During the period of time covered by this Indictment, Ray C. Broce, Gerald R. Gumm and Broce Construction Co., Inc. have engaged in the highway construction business within the State of Kansas.

3. Whenever in this Indictment reference is made to any act, deed, or transaction of any corporation, such allegation shall be deemed to mean that such corporation engaged in such act, deed or transaction by or through it officers, directors, agents, employees or representatives while they were actively engaged in the management, direction, control or transaction of its business or affairs.

## III
## CO-CONSPIRATORS

4. Various persons and firms, not made defendants herein, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.



## IV
## TRADE AND COMMERCE

5. Federal-Aid highways, including the highway which is the subject of this Indictment, are part of a nationwide network of interconnecting highways over which motor vehicles move in a continuous and uninterrupted stream of interstate commerce from and through one state to another. A substantial amount of the nation's goods move in interstate commerce over these highways via truck transportation.

6. In the development of a nationwide network of interconnecting highways, including the public highway which is the subject of this Indictment, the federal government and the State of Kansas have, to the date of this Indictment, cooperated in the financing and construction of such highways in the State of Kansas. In this connection, within the period of time covered by this Indictment, there was in existence a program for the development and improvement of highways financed and administered by the State of Kansas and the United States of America. This program was undertaken in accordance with the terms and conditions of Chapter 1 of Title 23 of the United States Code, Sections 101 *et seq.*, commonly known as the Federal-Aid Highway Act. Under this program the United States of America, through its agency, the Federal Highway Administration, furnished and furnishes, in combination with the State of Kansas, through its Department of Transportation, the funds needed to pay the costs of certain highway construction within the State of Kansas, including a portion of the highway construction which is the subject of this Indictment.

7. During the period of time covered by this Indictment, the Kansas Department of Transportation invited highway construction contractors to submit sealed competitive bids on highway construction projects. Such invitations are

known as highway lettings and occur approximately eight times per year in Topeka, Kansas. The State of Kansas awards contracts to the lowest responsible bidder following the opening of the sealed bids by its Department of Transportation.

8. During the period of time covered by this Indictment, there was in effect a State of Kansas law which governed the awarding of public highway projects by the Kansas Department of Transportation. That statute provided in part:

> 68-410. All contracts for the construction, improvement, reconstruction, and maintenance of the highway system, the cost of which exceeds one thousand dollars ($1,000), except contracts between the secretary of transportation and the various counties, shall be awarded at a public letting to the lowest responsible bidder . . . .

9. During the period of time covered by this Indictment, the State of Kansas required each bidder on public highway projects to execute a bid proposal providing in part:

> 6. In submitting this bid, the undersigned declares that they are the only person interested in the said bid; that it is made without any connection with any person or persons making another bid for the same contract; that the bid is in all respects fair and without collusion, fraud or misrepresentation.

10. During the period of time covered by this Indictment, there was a substantial, continuous and uninterrupted flow of steel, asphalt cement and other essential materials from suppliers outside of the State of Kansas to job sites within the State for use by highway contractors in the construction of public highways, including the job site of the project which is the subject of this Indictment. The activities of the defendants and co-conspirators, which are the subject of this Indictment, were within the flow of, and substantially affected, interstate commerce.



## V

## OFFENSE CHARGED

11. Beginning sometime in or about April, 1978, and continuing thereafter, the exact dates being to this grand jury unknown, in the District of Kansas, Ray C. Broce, Gerald R. Gumm and Broce Construction Co., Inc., defendants herein, and others known and unknown, entered into and engaged in a combination and conspiracy to suppress and eliminate competition for the construction of Project No. 23-60-RS-1080(9) let by the State of Kansas on April 25, 1978, which contract involved construction work on a Federal-Aid highway in the State of Kansas, in unreasonable restraint of the above-described interstate trade and commerce in violation of Title 15, United States Code, Section 1, commonly known as the Sherman Act.

12. The aforesaid combination and conspiracy consisted of an agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were:

(a) To allocate to Broce Construction Co., Inc., Project No. 23-60-RS-1080(9) let by the State of Kansas on April 25, 1978; and

(b) To submit collusive, noncompetitive, and rigged bids to the State of Kansas in connection with the above-referenced Federal-Aid highway project.

13. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which, as hereinbefore charged, they have combined and conspired to do, including:

(a) Discussing the submission of prospective bids on the above-described project let by the State of Kansas, Project No. 23-60-RS-1080(9);

(b) Designating the successful low bidder on the above-referenced Federal-Aid highway project;

(c) Submitting intentionally high or complementary bids on the above-referenced Federal-Aid highway project on which Broce Construction Co., Inc. had been designated as the successful low bidder;
(d) Submitting bid proposals on the above-referenced Federal-Aid highway project containing false, fictitious and fraudulent statements and entries; and
(e) Discussing the submission of prospective bids on other projects let by the State of Kansas on April 25, 1978.

**VI**

**EFFECTS**

14. The aforesaid combination and conspiracy charged herein has had the following effects, among others:
(a) Prices for the Federal-Aid highway project referred to in paragraph 11 of this Indictment have been fixed, maintained, and established at artificial and noncompetitive levels;
(b) Competition in the construction of the above-referenced Federal-Aid highway project has been restrained, suppressed, and eliminated;
(c) The State of Kansas has been denied the right to receive sealed competitive bids for the above-referenced public highway project; and
(d) The State of Kansas and the United States have been denied the benefits of free and open compeition for the above-referenced public highway project.

**VII**

**JURISDICTION AND VENUE**

15. The aforesaid combination and conspiracy was formed and carried out, within the District of Kansas and



within the jurisdiction of this Court. The aforesaid combination and conspiracy was carried out within five years preceding the return of this Indictment.

**COUNT TWO**

The Grand Jury further charges:
1. Each and every allegation contained in paragraphs 1 through 3 and 6 through 9 of Count One of this Indictment is here realleged with the same force and effect as though said paragraphs were set forth in full detail.
2. Beginning sometime in or about April, 1978, and continuing thereafter, the exact dates being to this grand jury unknown, in the District of Kansas, Ray C. Broce, Gerald R. Gumm and Broce Construction Co., Inc., defendants herein, and others known and unknown, devised and intended to devise a scheme and artifice to defraud the State of Kansas and the United States of America of:
(a) Money;
(b) Their right to open and free competition in the awarding of contracts for highway construction pursuant to their lawful statutes; and
(c) Their right to have their programs for the development and improvement of highways pursuant to their lawful statutes conducted honestly, fairly, and free from craft, trickery, deceit, corruption, dishonesty, and fraud.
3. It was part of the aforesaid scheme and artifice to defraud that:
(a) Broce Construction Co., Inc. would be and was allocated Project No. 23-60-RS-1080(9), let by the State of Kansas on April 25, 1978; and
(b) Collusive, noncompetitive, and rigged bids would be and were submitted to the State of Kansas in connection with the aforesaid project.
4. On or about the date of mailing listed below, in the District of Kansas, Ray C. Broce, Gerald R. Gumm and Broce Construction Co., Inc., defendants herein, for the purpose of executing said scheme and artifice to defraud

and attempting to do so, did knowingly cause the warrant for payment (a check from the State of Kansas) listed below to be delivered by mail by the United States Postal Service, according to the directions thereon, in violation of Title 18, United States Code, Section 1341:

| COUNT | SENDER | ADDRESSEE | WARRANT NO AND AMOUNT | APPROXIMATE DATE OF MAILING |
|---|---|---|---|---|
| 2 | State of Kansas Department of Transportation | Broce Construction Co., Inc. P.O. Box 580 Dodge City, Ks. 67801 | 5903642 $343,696.60 | 11-3-78 |

A TRUE BILL

DATED:

/s/ RICHARD J. BRAUN
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Attorney, Department of Justice
Room 2634 Everett M. Dirksen Bldg.
Chicago, Illinois 60604
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FOREMAN

/s/ WILLIAM F. BAXTER
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Joseph H. Widmar

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/s/ JIM J. MARQUEZ
Jim J. Marquez
United States Attorney For The
District of Kansas

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Supreme Court, U.S.
FILED
FEB 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1190

# In The Supreme Court Of The United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
*PETITIONER*

v.

RAY C. BROCE and
BROCE CONSTRUCTION CO., INC.
*RESPONDENTS*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that under the facts and circumstances of this particular case, a guilty plea does not in and of itself constitute a waiver of double jeopardy protection.

2. Whether the Court of Appeals erred in affirming the District Court's factual determination that the two indictments returned against respondents charged different aspects of the same conspiracy.

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OCTOBER TERM, 1987

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UNITED STATES OF AMERICA,
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v.

RAY C. BROCE and
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*RESPONDENTS*

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

---

## BRIEF FOR RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

The order and judgment of the court of appeals affirming the district court's grant of relief to respondents (Pet. App. 1a-4a) is unreported. The memorandum and order of the district court granting respondents relief

(Pet. App. 5a-13a) is unreported. The prior opinion of the en banc court of appeals reversing the district court's denial of relief (Pet. App. 14a-86a) is reported at 781 F.2d 792. The prior opinion of the court of appeals panel (Pet. App. 87a-111a), which was vacated on the grant of rehearing en banc, is reported at 753 F.2d 811. The original memorandum and order of the district court denying respondents relief (Pet. App. 112a-123a) is unreported.

## JURISDICTION

1. The order of the district court denying respondents' motion to vacate was entered on November 18, 1983. (Pet. App. 112a-123a)

2. The order of the court of appeals panel reversing the district court's order was entered January 9, 1985. (Pet. App. 87a-111a)

3. The order of the en banc court of appeals remanding was entered January 2, 1986. (Pet. App. 14a-86a)

4. The factual determination made by district court was entered June 30, 1986. (Pet. App. 5a-13a)

5. The order of the court of appeals panel sustaining the district court's factual determination and denying reconsideration of the court's January 2, 1986 en banc disposition was entered on August 18, 1987. (Pet. App. 1a-4a)



6. A petition for rehearing and suggestion for rehearing en banc was denied on November 13, 1987. (Pet. App. 124a-125a)

The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

## CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

## STATEMENT

Respondents Ray C. Broce and Broce Construction Co., Inc. represent a Kansas Corporation and it's owner engaged in the highway construction business with it's principal office at Dodge City, Kansas.

On November 17, 1981, a two-count indictment was returned against respondents and others charging a violation of Sec. 1 of the Sherman Act (15 U.S.C. 1) and mail fraud in violation of 18 USC 1341. ("Broce 1") (U.S. v. Broce Construction Co., Inc. et al., Criminal No. 81-20119-01 (D. Kans). Respondent Ray Broce, President of Broce Construction was identified by the Government as a co-conspirator in Broce I. (Pet. App. 143a-151a)

In Count I of Broce I Indictment, it was charged that the respondents had engaged in a combination and conspiracy to submit colusive, noncompetitive and rigged

bids on project No. 23-60-RS-1080 (9) let by the State of Kansas on April 25, 1978. In Count II it was charged that the respondents engaged in a scheme and artifice to defraud the State of Kansas and the United States by causing a warrant to be delivered by the United States mail in payment of the project referred to in Count I. (Indictment, Crim. No. 81-20119-01, Count I, Par. 11-13, Count II, Par. 3-4). (Pet. App. 143a-151a)

By a letter of January 11, 1982, petitioner notified respondents and their attorneys just before trial of the first indictment that the petitioner was going to seek an additional indictment. This was consistent with petitioner's position in all prosecutions of alleged bid rigging in the State of Kansas wherein they would notify the respondents prior to trial that in essence that if the respondents did not enter a plea of guilty then petitioner would seek another indictment on some other project. The petitioner was notified that the respondents Ray Broce and Broce Construction wished to enter a plea of guilty to the first indictment. The respondents were in the position of entering a plea of guilty or facing multiple indictments and trials. On January 27, 1982, the respondents entered into a plea agreement with petitioner. Petitioner required that respondents be convicted of two anti-trust violations carrying a potential One Million Dollar fine for respondent Broce Construction and One Hundred Thousand Dollars for respondent Ray Broce. Respondent Ray Broce plead guilty to both



Counts I and II in the first indictment and was fined and imprisoned on each count. Respondent Ray Broce also was required to plead guilty to the one count in the second indictment. Respondent Broce Construction plead guilty to the first count of the first indictment and was fined Seven Hundred Fifty Thousand Dollars. Under the terms of the plea agreement Count II of the second indictment was dismissed. This eliminated respondent Broce Construction Co. from a potential One Thousand Dollar fine. The petitioner also agreed not to prosecute respondents further in Kansas even though they could not legally do so nor prosecute them in Oklahoma where no charges had ever been filed. Petitioner further agreed to recommend a fine of One and one-half Million Dollars against the corporation on the Sherman Act charges when the maximum legal fine was One Million Dollars. (Pet. App. 127a-128a, 134a-135a)

On February 4, 1982, a second indictment was returned against respondent Broce Construction and respondent Ray Broce. It contained one count for alleged violation of the Sherman Act (15 U.S.C. Sec 1) The indictment in Broce II is identical in all respects to the indictment in Broce I except Jerry Gumm, General Manager of Broce Construction, was eliminated as a defendant; different project numbers are set out with the first indictment referring to a period beginning April 19, 1978 and continuing thereafter and the second indictment beginning on or about July 19, 1978, and con-

tinuing thereafter; a substitution of terminology where the first indictment refers to "Federal Aid Highway Project" and the second indictment refers to "Public Highway Construction Project" and a paragraph numbering change. (Pet. App. 136a-142a) The respondents and their attorney appeared for a plea on February 8, 1982. Just prior to the plea the respondents and their attorney were handed the second indictment. At that time, neither respondent was advised of their double jeopardy rights. Mr. Crockett, counsel for the respondents at that time, filed a sworn affidavit with the Court that defense counsel did not consider the issue of double jeopardy nor was the issue of double jeopardy discussed with the respondents. The record clearly demonstrates that the Court advised the respondents of numerous constitutional rights but never at any time discussed the issue of double jeopardy or advised respondents of their double jeopardy rights.

On March 15, 1982, sentence was pronounced in both Broce I and Broce II. In Broce I respondent corporation was fined Seven Hundred Fifty Thousand Dollars and the mail fraud count was dismissed. In Broce II respondent corporation was fined Seven Hundred Fifty Thousand Dollars. Respondent Ray Broce received a fine of Fifty Thousand Dollars and two years imprisonment for each anti-trust charge, the sentences to run concurrent. Respondent Ray Broce was fined the sum of One Thousand Dollars and sentenced to two



years on Count II of Broce I. The sentence of imprisonment was concurrent with the previous sentences. The total fine against respondent corporation was One and one-half Million Dollars and the total fine against respondent Ray Broce was One Hundred and one Thousand Dollars.

On February 22, 1983, respondents, pursuant to F. R. Crim. P. 35 (A) filed a motion to vacate the judgment and sentence in Broce II, claiming that the judgment and sentence in Broce II was illegal in that it violated the double jeopardy clause of the Fifth Amendment of the United States Constitution. The motion was made after a decision filed January 31, 1983, in a similar case in the State of Kansas involving other indicted corporations and defendants for bid rigging. In *United States of America v. Beachner Construction Co., Inc.*, 555 S.Supp. 1273 (D Kan. 1983) which was affirmed by the court of appeals (729 F.2nd 1278 (1984)), District Judge Saffels found after an evidentiary hearing that the conspiracy to rig bids on Kansas highway construction projects was a continuing conspiracy and that subsequent prosecutions of an acquitted corporation constituted double jeopardy. The district court denied the motion of respondents by concluding that respondents had waived their right to the double jeopardy claim and their right to challenge the sentence on that basis by pleading guilty. The district court did not ad-

dress the question of whether there was one or multiple conspiracies. (Pet. App. 112a-123a)

The court of appeals reversed in *United States v. Broce*, 753 F.2nd 811 (10th Cir. 1985) and petitioner requested a new hearing *en banc*. This Court sitting *en banc* concluded from the facts that the plea of guilty did not waive the defense of double jeopardy under the circumstances of this case. *United States v. Broce*, 781 F.2d 792, (10th Cir. 1986). The Court remanded the case for a determination on the evidence as to the existence of a single or separate conspiracy. Petitioner had previously stipulated that the record in the Beachner evidentiary hearing be used as part of the factual record. (Pet. App. 22a) In that record Judge Saffels analized the usual and common system of setting up Kansas highway jobs; the common language; the lack of precautions; the continuing obligations among contractors; the necessity of telling other contractors if everyone had agreed "to go along"; the common purpose and objective; and concluded that bid rigging was "a way of life in Kansas". (Pet. App. 22a-23a)

Guided by the common objective test in *United States v. Wilshire Oil Company of Texas*, 427 F.2d 969 (10th Cir.) *Cert. Denied*, 400 U.S. 829 (1970) the District Court held that the conspiracies charged as anti-trust violations in Broce I and Broce II were a single conspiracy and ordered the conviction in Broce II vacated as to respondents. (Pet. App. 5a-13a)



Petitioner once again appealed arguing that the District Court erred in finding that factually there was one continuing conspiracy. The government also urged the court to reconsider its en banc opinion of January 2, 1986.

The court of appeals, after considering this Court's most recent case in this area of the law, *Ricketts v. Adamson*, No. 86-6 (June 22, 1987), wrote (Pet. App. 1a-3a):

> "... Although *Ricketts* invalidates the broader rationale underlying the plurality opinion in *Broce*, that the double jeopardy prohibition "does not constitute an individual right which is subject to waiver," 781 F.2d at 795, it does not affect its narrower holding, based on clear Supreme Court precedent, that a guilty plea does not itself constitute a waiver of double jeopardy protection. *Id.* at 796-97; see also *Menna v. New York*, 423 U.S. 61, 62-63 & n.2 (1975) (guilty plea is merely an admission of factual guilt, which does not bar a claim that the state may not constitutionally prosecute the defendant no matter how validly his factual guilt is established); *Blackledge v. Perry*, 417 U.S. 21, 29-31 (1974). To the extent that the government's first argument may read as requesting reconsideration of the court's en banc disposition, we will not do so. 10th Cir. R. 35.6
>
> The government next argues that the district court's factual finding that both indictments charged a single conspiracy was clearly erroneous. We have examined the record carefully and we are satisfied that the district court's decision was not clearly errone-

ous. *cf. United States v. Beachner Construction Co.*, 729 F.2d 1278, 1281-83 (10th Cir. 1984)."

Petitioner's request for rehearing was denied and the petitioner's suggestion for rehearing en banc was also denied (Pet. App. 124a-125a)

## ARGUMENT

WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT UNDER THE FACTS AND CIRCUMSTANCES OF THIS PARTICULAR CASE, A GUILTY PLEA DOES NOT IN AND OF ITSELF CONSTITUTE A WAIVER OF DOUBLE JEOPARDY PROTECTION.

Petitioner argues that respondents waived the violation of their double jeopardy rights because they entered a plea of guilty. The court specifically found that the plea of guilty was not a bar to consideration of whether the charge contained in the second indictment was void because of the double jeopardy clause of the Fifth Amendment.

Petitioner argues that respondents entered counseled pleas of guilty to both indictments and therefore waived their right for the court to consider double jeopardy. Petitioner's position was specifically rejected in *Menna v. New York*, 423 U.S. 61 (1975). The court of appeals sitting en banc previously adopted the position that the government never had the right to bring respondents into court to face the second indictment. *United States*



*of America v. Broce* 781 F.2d 792 (Tenth Circuit 1986)

Petitioner argues that there was a plea agreement requiring respondents to plead guilty to a second indictment and that respondents received substantial benefits. Respondent Ray Broce received no benefits as he plead guilty to all charges in the first indictment and the Anti-Trust Count in the second indictment. He was fined and sentenced to prison on each count. The mail fraud count in the first indictment against Respondent Broce Construction was dismissed. The court of appeals rejected petitioners contention that the dismissal of one count of mail fraud with a possible One Thousand Dollar fine granted substantial benefits to the respondent corporation so that the court should uphold it's illegal conviction on a anti-trust violation which carries a One Million Dollar fine. The petitioner further contends that it agreed not to prosecute respondents in the State of Kansas or Oklahoma. Since petitioner could not legally prosecute either respondents under their conspiracy theory for various projects in the State of Kansas, the petitioner failed to demonstrate to the Court where any substantial benefit was obtained by these respondents. No charges have ever existed against either of these respondents in the State of Oklahoma and there is no evidence in the record that the petitioner had either the intention or the right to instigate prosecution against these respondents in Oklahoma. The total sum benefit received by the respondents was that the respondent

corporation did not have to pay a possible maximum One Thousand Dollar fine in Count II of the first indictment. The petitioner argues that this should outweigh the fact that they could never legally bring the charge set out in the second indictment.

Petitioner argues that a guilty plea is an admission of all material facts in an indictment and that the two indictments against respondents charged separate conspiracies. Petitioner contends that the double jeopardy issue in this case was based on separate and distinct agreements to rig bids on particular projects. This position is directly contrary to petitioner's own argument that bid rigging was a way of life in the State of Kansas and specifically petitioner's evidence presented to the trial court that the contract let April 25, 1978, contained as part of conspiracy an agreement to give certain future projects to other contractors. It defies logic to adopt a position that a number of contractors conspired to award a given project to one contractor with no thought of having any effect on the letting of future projects. The argument that the face of the indictment charged different conspiracies has been analized and specifically rejected by the court of appeals panel (Pet. App. 87a-111a), reported at 781 F.2d 792. The opinion sets forth the paragraphs of the indictment in some detail and concludes that petitioner's own statement demonstrates the conspiracy involved in project number 23-60-RS-1080 (9) concerned other projects. In examining the face of



the indictments, Judge Bohanon, writing for the majority, stated "indeed, nothing in either indictment is definitely inconsistent with the view that the conspiracies they allege are in fact identical . . ." (Pet. App. 87a-111a)

Petitioner urges this Court to review this case even though the court of appeals ruled under the guidance of this Court's most recent decision in this area. After three appeals by petitioner, the court of appeals consistent with it's previous holdings, found (Pet. App. 1a-3a):

> ". . .The Supreme Court's recent decision in *Rickets v. Adamson*, 55 U.S.L.W. 4914 (U.S. June 22, 1987), made it clear that a criminal defendant may voluntarily waive his double jeopardy protection. *Id.* at 4916 ("an agreement specifying that charges may be *reinstated* given certain circumstances is . . . *precisely* equivalent to an agreement waiving a double jeopardy defense"). Although *Ricketts* invalidates the broader rationale underlying the plurality opinion in *Broce*, that the double jeopardy prohibition "does not constitute an individual right which is subject to waiver," 781 F.2d at 795, it does not affect its narrower holding, based on clear Supreme Court precedent, that a guilty plea does not itself constitute a waiver of double jeopardy protection. *Id.* at 796-97; see also *Menna v. New York*, 423 U.S. 61, 62-63 & n.2 (1975) (guilty plea is merely an admission of factual guilt, which does not bar a claim that the state may not constitutionally prosecute the defendant no matter how validly his factual guilt is established); *Blackledge v. Perry*, 417

U.S. 21, 29-31 (1974). To the extent that the government's first argument may be read as requesting reconsideration of the court's en banc disposition, we will not do so . . ."

WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S FACTUAL DETERMINATION THAT THE TWO INDICTMENTS RETURNED AGAINST RESPONDENTS CHARGED DIFFERENT ASPECTS OF THE SAME CONSPIRACY.

Petitioner for the first time argues that respondents were not entitled to a factual determination as to whether there was one or multiple conspiracies. Petitioner previously stipulated that the court "'consider the record made in the evidentiary hearing'" held in the *Beachner* case (see Pet. App. 63a). Not only did petitioner so stipulate, there was no objection raised nor any reservations placed on the stipulation. A review of petitioner's docketing statement with the court of appeals and their previously filed briefs question the results of the court's factual determination but not the right to make that determination. It appears that because petitioner is dissatisfied with the result of the factual determination it attempts to raise new an issue not heretofore presented to either the district court or the court of appeals.

The District Court without any objection from petitioner and relying on the stipulation of petitioner, utilized the "common objective" test and made the following factual findings:



1. ". . . the construction contractors active in the state during that period had a 'common objective'."
2. ". . . the separate bid riggings had been effected through a 'common method'."
3. ". . . the conspiring contractors used and understood 'common jargon'."
4. ". . . none of the [contractors] expressed any fear or concern that approaching a fellow contractor about this illegal activity would result in their being reported to the authorities."
5. ". . . the process of requesting and submitting complementary bids [created] 'mutual and interdependent obligations' . . . among contractors who participated in 'set-up' jobs."
6. ". . . [the conspiracy was continuously present and could be 'plugged into' at any time."

(Pet. App. 5a-13a)

The district court then concluded:

"Because the two indictments returned against these defendants charge simply different aspects of the same conspiracy to restrain competition, we conclude that the defendants' conviction under both indictments (even though obtained through guilty pleas) constituted a violation of their rights under the double jeopardy clause of the fifth amendment." (Pet. App. 5a-13a)

The court of appeals reviewed the district courts

findings and properly found that the district court's decision was not clearly erroneous. (Pet. App. 12-3a)

Petitioner had the burden to clearly demonstrate error in the district court's findings. Factual findings of the district court are not lightly to be set aside. Where the evidence supports a conclusion either way, the choice between two permissible views of the weight of the evidence is not "clearly erroneous." *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). Moreover, an appellate court views a district court's findings based on sharply conflicting evidence as "conclusively binding." *Buena Vista Homes, Inc. v. United States*, 281 F.2d 476, 480 (10th Cir. 1960).

When, as here, the district court's findings are supported by substantial evidence, such findings cannot be "clearly erroneous." *Wagner Tractor, Inc. v. W. E. Shields*, 381 F.2d 441, 445 (9th Cir. 1967). Even an "adequate basis" for the findings suffices. *Sawyer v. United States*, 298 F.2d 333 (U.S. App. D.C. 1962).

## CONCLUSION

Petitioner argues that the court of appeals decision in this case would "portend a nightmare for the federal courts as well as for state and federal prosecutors". This argument is meritless as this case merely requires that petitioner comply with the law and stop their attempts



at making separate and multiple conspiracies out of a single conspiracy.

The judgment of the court of appeals sitting *en banc* finding no waiver of double jeopardy under the facts in this case and the judgment of the District Court on remand from the Court of Appeals finding that " . . . the two indictments returned against these respondents charge simply different aspects of the same conspiracy to restrain competition . . . " which was affirmed by the court of appeals should stand and the petition for writ of certiorari should be denied.

Respectfully submitted,

Curt T. Schneider
SCHNEIDER & CASEBEER
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*Attorneys for Respondent*

February, 1988

(4)

No. 87-1190

Supreme Court, U.S.
FILED
FEB 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## REPLY MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

5 pp

# In the Supreme Court of the United States

OCTOBER TERM, 1987

---

No. 87-1190

UNITED STATES OF AMERICA, PETITIONER

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

**REPLY MEMORANDUM FOR THE UNITED STATES**

---

We file this reply only to respond to one serious misstatement in respondents' brief in opposition. The government has argued consistently, and not "for the first time" in the petition, that "respondents were not entitled to a factual determination as to whether there was one or multiple conspiracies" (Br. in Opp. 14).

Respondents' motion to vacate sentence was filed on February 22, 1983. The government's response was filed on March 21, 1983. The response stated (at 11): "In the case at bar, the factual allegations of the two indictments on their face charge separate conspiracies, and the double jeopardy claim must be evaluated under the version of facts set forth in the indictments." It also stated (at 14): "The facts and issues raised by the *Beachner* defendants are precisely the kind that must either be raised before a plea of guilty or be waived."

On March 30, 1983, the parties filed a joint stipulation in the district court. The stipulation, which is quoted in full in Judge Barrett's dissent from the decision of the en banc court of appeals in this case (Pet. App. 63a), reads as follows:

> Come now the parties and stipulate that the Court may consider the record made in the evidentiary hearing on the Motion to Dismiss filed by Beachner Construction Co., Inc. in *United States v. Beachner Construction Co., Inc., et al.*, Case No. 82-20076-01 in the United States District Court for the District of Kansas in ruling on the merits of defendants' Motion to Vacate Sentence Pursuant to Rule 35(a) in the instant case.

Respondents apparently contend that this unremarkable stipulation represents an abandonment of the government's previous position that respondents were bound by the facts that they had admitted at the time their pleas were taken and were not entitled to a new factual determination. The government, however, made no such abrupt about-face.

On November 10, 1983, government counsel wrote to the district court enclosing, at the court's request, the transcript of the evidentiary hearing in the *Beachner* case. Counsel wrote:

> I would like to take this opportunity to reiterate our position that a review of this evidentiary record by the Court is not necessary, and, indeed, would not be appropriate in determining whether the sentences imposed by this Court upon [respondents] are unlawful under the Double Jeopardy Clause of the Constitution. [Respondents'] counseled pleas admitted the factual allegations of the two indictments and those indictments on their face established two separate



agreements, each a conspiracy in violation of the antitrust laws. Consequently, the Court's inquiry as to whether conviction on both counts would violate the Double Jeopardy Clause cannot look beyond those indictments.

> [Respondents] have waived any double jeopardy claims they might have asserted prior to their pleas * * *. However, even if the Court finds that [respondents] may yet assert a double jeopardy claim, that claim must be judged in light of the facts set forth in the indictments. *Kerrigan v. United States,* 644 F.2d 47 (1st Cir. 1981); *see also Menna v. New York,* 423 U.S. 61, 68 n.2 (1975). * * * In the cases at hand, by admitting the facts set forth on the face of the indictments, [respondents] have defeated their double jeopardy claims. * * * Therefore, were the Court to determine that [respondents] have not waived their Double Jeopardy claim, the Court could, and should resolve that Double Jeopardy claim by a review of the indictments alone.

On November 18, 1983, the district court denied respondents' motion to vacate sentence, agreeing with the government that respondents had no right to obtain a factual determination whether two conspiracies or only one existed (Pet. App. 112a-123a). In addition to agreeing (*id.* at 119a-122a) with the analysis of *Kerrigan* v. *United States,* 644 F.2d 47 (1st Cir. 1981), on which the government has consistently relied, the district court wrote (Pet. App. 123a): "[W]e do not believe at this late date [respondents] should be permitted to take advantage of a factual determination that is inconsistent with the facts [respondents] admitted in pleading guilty to the indictments alleging two separate conspiracies."

On respondents' appeal of this ruling, the government continued to urge that the district court had correctly re-

fused to make a factual determination of respondents' contention that there had been only one conspiracy (see, *e.g.*, U.S. Br. 22-23, C.A. No. 83-2558). The court of appeals, however, rejected the government's position and remanded "for a factual determination" (Pet. App. 24a).

On remand in the district court, we noted our disagreement with the appellate decision and indicated that we might seek certiorari from this Court once the case ceased to be in an interlocutory posture (Br. for the United States on Remand from the Tenth Circuit Court of Appeals for a Factual Determination 4 n.2). On appeal from the district court's ruling on remand, our primary argument was that the prior en banc decision—in which we had urged that respondents could not obtain a factual determination—should be reconsidered (see Pet. App. 2a). It is on that issue that we now seek certiorari.

In sum, respondents are quite wrong to suggest that the government is objecting "for the first time" to respondents' belated attempt to obtain a factual determination of the one-conspiracy-or-two question. We have diligently pursued our objections to any such determination throughout this litigation.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
*Solicitor General*

FEBRUARY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE 1988—202 037/60292

Supreme Court, U.S.
FILED
APR 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 87-1190

# In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## JOINT APPENDIX

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**PETITION FOR A WRIT OF CERTIORARI FILED JANUARY 12, 1988**
**CERTIORARI GRANTED FEBRUARY 29, 1988**

808

# In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1190

UNITED STATES OF AMERICA, PETITIONER

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## JOINT APPENDIX

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The following opinions, decisions, judgments, orders, indictments, and plea agreements have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed petition for a writ of certiorari:


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Memorandum and order of district court dated 6/30/86 ..... 5a

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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No. 83-2558

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

RAY C. BROCE, DEFENDANT-APPELLANT

---

**DOCKET ENTRIES**

---

| DATE | FILINGS – PROCEEDINGS | Filed |
|---|---|---|
| 1983 | | |
| Dec. 1 | Case docketed | |
| Dec. 13 | Record on appeal filed, Vol. I (pleadings) (135 pp.), Vol. II (pleadings) (328 pp.), Originals (463 tpp.) | |
| Dec. 27 | Appellant's motion for stay pending appeal filed, original and 3cc, c/s | |
| | Appellant's motion for stay pending appeal submitted to panel | |
| Dec. 29 | Granted appellant's motion for stay pending appeal disposed of by McWilliams, Barrett, Doyle | |
| 1984 | | |
| Feb. 27 | Appellant's brief filed, orig & 9cc,c/s | |
| Apr. 11 | Appellee's brief filed, orig. & 10cc,c/s | |

| DATE | FILINGS – PROCEEDINGS | Filed |
|---|---|---|
| May 4 | Appellant's reply brief filed, orig & 8cc,c/s (briefs for 83-2559 filed in 83-2558) | |
| Sept. 12 | Case argued and submitted – Seth, Doyle, Bohanon | |
| Dec. 26 | Appellant's motion for stay of district court order filed, orig and 3cc, c/s | |
| | Appellant's motion for stay submitted to panel | |
| Dec. 28 | Order granting appellant's motion for stay pending appeal Seth, Doyle and Bohanon (parties notified by mail) | |
| 1985 | | |
| Jan. 9 | Published, signed opinion filed – Seth, Doyle, Bohanon. Writing Judge is Bohanon. (parties served by mail) | |
| | Judgment is vacated. | |
| Jan. 16 | Published, dissenting opinion filed by Seth. (parties served by mail) | |
| Feb. 22 | Appellee's petition for rehearing, with suggestion for rehearing in banc, filed, orig + 12cc., c/s, and submitted to panel. | |
| May 23 | Appellee's petition for rehearing and suggestion for rehearing in banc is granted – Holloway, Seth, Barrett, Doyle, McKay, Logan, Seymour (parties served by mail) Bohanon | |
| | Judgment of 1/9/85 is vacated – in banc panel. (parties served by mail) | |
| Aug. 8 | Case argued and submitted – en banc panel + Doyle | |



| DATE | FILINGS – PROCEEDINGS | Filed |
|---|---|---|
| 1986 | | |
| Jan. 2 | Published, signed opinion filed – Holloway, Barrett, Doyle, McKay, Logan, Seymour, Moore. Writing Judge is Moore. | |
| | Judgment is reversed. Cause remanded. | |
| | Published, concurring opinion filed by McKay. (parties served by mail) | |
| | Published, concurring opinion filed – Seymour. (parties served by mail) | |
| | Published, dissenting opinion filed – Seymour. (parties served by mail) | |
| | Published, dissenting opinion filed – Barrett. (parties served by mail) | |
| | Published, dissenting opinion filed – Doyle. (parties served by mail) | |
| Feb. 14 | Mandate issued to district court | |
| Aug. 11 | Record on appeal returned to district court (Vol I-II) | |

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 83-2559

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

BROCE CONSTRUCTION CO., INC., DEFENDANT-APPELLANT

**DOCKET ENTRIES**

| DATE | FILINGS – PROCEEDINGS | Filed |
|---|---|---|
| 1983 | | |
| Dec. 1 | Case docketed | |
| Dec. 13 | Record on appeal filed, Vol. I (pleadings) (135 -pp.), Vol. II (pleadings) (328 pp.), Originals (463 tpp.) | |
| Dec. 27 | Appellant's motion for stay pending appeal filed, original and 3cc, c/s | |
| | Appellant's motion for stay pending appeal submitted to panel | |
| Dec. 29 | Granted appellant's motion for stay pending appeal disposed of by McWilliams, Barrett, Doyle | |
| 1984 | | |
| Feb. 27 | Appellant's brief filed, orig & 9cc,c/s | |
| Apr. 11 | Appellee's brief filed, orig. & 10cc,c/s | |
| May 4 | Appellant's reply brief filed, orig & 8cc,c/s (briefs filed in 83-2558) | |



| DATE | FILINGS – PROCEEDINGS | Filed |
|---|---|---|
| Sept. 12 | Case argued and submitted – Seth, Doyle, Bohanon | |
| Dec. 26 | Appellant's motion for stay of district court order filed, orig and 3cc, c/s | |
| | Appellant's motion for stay submitted to panel | |
| Dec. 28 | Order granting appellant's for stay pending appeal Seth, Doyle and Bohanon (parties notified by mail) | |
| 1985 | | |
| Jan. 9 | Published, signed opinion filed – Seth, Doyle, Bohanon. Writing Judge is Bohanon. (parties served by mail) | |
| | Appeal dismissed. | |
| | Mandate issued to district court. | |
| Jan. 16 | Published, dissenting opinion filed by Seth. (parties served by mail) | |
| Feb. 22 | Appellee's petition for rehearing, with suggestion for rehearing in banc, filed, orig + 12cc., c/s, and submitted to panel. | |
| May 23 | Appellee's petition for rehearing and suggestion for rehearing in banc is granted – Holloway, Seth, Barrett, Doyle, McKay, Logan, Seymour (parties served by mail) Bohanon | |
| | Order mandate issued 1/9/85 recalled – in banc panel. (parties, district court served by mail) | |
| | Judgment of 1/9/85 is vacated – in banc panel. (parties served by mail) | |
| May 30 | Mandate returned from district court. | |

| DATE | FILINGS – PROCEEDINGS | Filed |
|---|---|---|
| Aug. 8 | Case argued and submitted – en banc + Doyle | |
| Jan. 2 | Published, signed opinion filed – Holloway, Doyle, Barrett, McKay, Logan, Seymour, Moore. Writing Judge is Moore. (parties served by mail) | |
| | Case dismissed. | |
| | Mandate issued to district court. | |
| | Published, concurring opinion filed – McKay. (parties served by mail) | |
| | Published, concurring opinion filed – Seymour. (parties served by mail) | |
| | Published, dissenting opinion filed – Seymour. (parties served by mail) | |
| | Published, dissenting opinion filed – Barrett. (parties served by mail) | |
| | Published, dissenting opinion filed – Doyle. (parties served by mail) | |
| Aug. 11 | Record on appeal returned to district court (Vol I-II) | |



UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 86-2166

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

RAY C. BROCE, DEFENDANT-APPELLEE,
BROCE CONSTRUCTION COMPANY, INC.,
DEFENDANT-APPELLEE,
GERALD R. GUMM, DEFENDANT

**DOCKET ENTRIES**

| DATE | FILINGS – PROCEEDINGS | Filed |
|---|---|---|
| 1986 | | |
| Aug. 7 | Criminal case docketed. | (mt) |
| | Preliminary record on appeal filed. | (mt) |
| Aug. 12 | Amended notice of appeal filed. | (mt) |
| 1987 | | |
| Jan. 20 | Appellant's brief filed by USA in 86-2166, USA in 86-2202. Original and 11 copies. c/s: y | (jg) |
| Feb. 5 | Appellee's brief filed by Ray C. Broce & Broce Construction in 86-2166 & in 86-2202. Original and 12 copies. c/s: y | (jg) |
| Mar. 3 | Appellant's reply brief filed by USA in 86-2166, USA in 86-2202. Original and 11 copies. c/s: y | (mt) |

| DATE | FILINGS – PROCEEDINGS | Filed |
|---|---|---|
| Mar. 16 | Record on appeal filed: Volumes I-II (Pleadings), Copies; Volume III (Grand Jury Transcripts), ORIGINAL – SEALED; Volume IV (Presentence Reports), ORIGINAL – SEALED; Volume IV (Presentence Reports), ORIGINAL – SEALED; Volumes V-VII (Transcripts) (549 pp), Copies. | (jg) |
| May 19 | Case argued and submitted to Judges Logan, Barrett, Timbers. | (dvc) |
| Aug. 18 | Order and judgment filed by Logan, authoring judge, Barrett, panel member, Timbers, panel member, judgment affirmed. | (sys) |
| Sept. 8 | Petition for rehearing en banc filed by USA in 86-2166. Original and 11 copies. c/s: y | (sys) |
| Sept. 9 | Petition for rehearing en banc filed by Appellant USA submitted to panel. | (sys) |
| Nov. 13 | Order filed by EN BANC panel denying Petition for rehearing en banc. Judge Tacha did not participate in consideration of the suggestion for rehearing en banc. in 86-2202, denying Petition for rehearing en banc in 86-2202 | (lwb) |
| Nov. 23 | Mandate issued to the district court. | (mt) |
| 1988 | | |
| Jan. 28 | Petition for writ of certiorari filed on 1/12/88 by Appellant USA in 86-2166, Appellant USA in 86-2202. | (lwb) |
| Mar. 8 | Supreme Court order dated 2/29/88 granting certiorari filed. | (mt) |



UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

---

No. 86-2202

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

RAY C. BROCE, DEFENDANT-APPELLEE,
BROCE CONSTRUCTION COMPANY, INC.,
DEFENDANT-APPELLEE,
GERALD R. GUMM, DEFENDANT

---

**DOCKET ENTRIES**

---

| DATE | FILINGS – PROCEEDINGS | Filed |
|---|---|---|
| 1986 | | |
| Aug. 13 | Criminal case docketed. | (mt) |
| | Preliminary record on appeal filed. | (mt) |
| 1987 | | |
| Jan. 20 | Appellant's brief filed by USA in 86-2166, USA in 86-2202. Original and 11 copies. c/s: y | (jg) |
| Feb. 5 | Appellee's brief filed by Ray C. Broce & Broce Construction in 86-2166 & in 86-2202. Original and 12 copies. c/s: y | (jg) |
| Mar. 3 | Appellant's reply brief filed by USA in 86-2166, USA in 86-2202. Original and 11 copies. c/s: y | (mt) |
| Mar. 16 | Record on appeal filed: Volumes I-II (Pleadings), Copies; Volume III (Grand Jury Transcripts), ORIGINAL – SEALED; | |

| DATE | FILINGS–PROCEEDINGS | Filed |
|---|---|---|
| | Volume IV (Presentence Reports), ORIGINAL–SEALED; Volumes V-VII (Transcripts) (549 pp), Copies. | (jg) |
| May 19 | Case argued and submitted to Judges Logan, Barrett, Timbers. | (dvc) |
| Aug. 18 | Order and judgment filed by Logan, authoring judge, Barrett, panel member, Timbers, panel member, judgment affirmed. | (sys) |
| Sept. 8 | Petition for rehearing en banc filed by USA in 86-2202. Original and 11 copies. c/s: y | (sys) |
| Sept. 9 | Petition for rehearing en banc filed by Appellant USA submitted to panel. | (sys) |
| Nov. 13 | Order filed by EN BANC panel denying Petition for rehearing en banc. Judge Tacha did not participate in consideration of the suggestion for rehearing en banc. in 86-2202, denying Petition for rehearing en banc in 86-2202 | (lwb) |
| Nov. 23 | Mandate issued to the district court. | (mt) |
| 1988 | | |
| Jan. 28 | Petition for writ of certiorari filed on 1/12/88 by Appellant USA in 86-2166, Appellant USA in 86-2202. | (lwb) |
| Mar. 8 | Supreme Court order dated 2/29/88 granting certiorari filed. | (mt) |



UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Criminal Action No. 81-20119-01

UNITED STATES OF AMERICA

*v.*

BROCE CONSTRUCTION CO., INC., RAY C. BROCE, AND GERALD R. GUMM, DEFENDANTS

**DOCKET ENTRIES**

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1981 | | |
| Nov. 17 | 1 | INDICTMENT |
| Nov. 23 | 9 | RULE 5 HEARING at KC-MAG. JMS: Deft. BROCE CONSTRUCTION CO. Omni/Arr set 11-23-81 at 9:30 A.M. |
| Nov. 23 | 11 | ARRAIGNMENT/PLEA at KC-MAG. JMS: Deft. BROCE CONSTRUCTION CO., N/G, Ct. #1 and #2, Motions-12-8-81, Response–12-18-81–Hearing on Motions–12-21-81 at 10:30 A.M. |
| Nov. 23 | 12 | RULE 5 HEARING at KC-MAG. JMS: Deft. RAY C. BROCE, Conditions of Release, Bail Release Order, APPEARANCE BOND: 6711 E. Morlick Road, Phoenix, Arizona Omni/Arr set 11-23-81 at 9:30 A.M. |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| Nov. 23 | 14 | ARRAIGNMENT/PLEA at KC-MAG. JMS: Deft. RAY C. BROCE, N/G, Ct. #1 and #2, Motions-12-8-81, Response-12-18-81, Hearing on Motions-12-21-81 at 10:30 A.M. |
| Dec. 08 | 21 | MOTION of Defts' for Bill of Particulars |
| Dec. 18 | 33 | Gov't Voluntary Bill of Particulars in Response to Defts. Mtn. |
| 1982 | | |
| Jan. 15 | 39 | ORDER ENTERED-EEO: Trial set for 2-8-82 at 9:30 A.M. before Judge O'Connor in Topeka, Kansas. |
| Feb. 08 | 44 | Plea Agreement between United States of America and Deft. Broce Construction Co., Inc. |
| Feb. 08 | 45 | PETITION and ORDER ENTERED-EEO: Deft. BROCE CONSTRUCTION CO. to enter Plea of Guilty |
| Feb. 08 | 46 | CHANGE OF PLEA AT KC-EEO: DEFT. BROCE CONSTRUCTION CO. INC. Guilty, Ct. #1 (Accepted), N/G, Ct. #2, Judgment Deferred, P/S/I pending. Sentencing set for 3-15-82 at 10:30 A.M. Ct. #2 to be dismissed on Motion of U.S. Attorney at time of sentence. |
| Feb. 08 | 47 | Plea Agreement between United States of America and Deft. Ray C. Broce |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | (Statement of Facts in Support of Pleas attached) |
| Feb. 08 | 48 | PETITION and ORDER ENTERED-EEO: Deft. RAY C. BROCE to enter plea of guilty |
| Feb. 08 | 49 | CHANGE OF PLEA AT KC-EEO: Deft. RAY C. BROCE Guilty, Ct. #1 and #2 (Accepted), Judgment Deferred, P/S/I pending. Sentencing set for 3-15-82 at 10:30 A.M. |
| Mar. 15 | 55 | SENTENCE at KC-EEO: Deft. BROCE CONSTRUCTION CO. Ct. #1, Fined $750,000. One Third of fine to be paid by 12-31-82; one third of fine to be paid by 12-31-83 and one third of fine to be paid by 12-31-84. Ct. #2—Dismissed on motion of U.S. Attorney. |
| Mar. 15 | 56 | SENTENCE at KC-EEO: Deft. RAY C. BROCE, Ct. #1, 2yrs. impr., Ct. #2, 2 yrs. impr. to run conc. with Ct. #1. Elig. for parole pur. 18:4205(b)(2) and fined $50,000 on Ct. #1 and $1,000 on Ct. #2 with total fine of $51,000. Deft. fine to be paid in full prior to Deft's release from incarceration. Ct. rec. sent. be served at a minimum security institution and deft. will be permitted to surrender directly to designated institution. Deft. will be granted a stay to 3-29-82 |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | and deft. is directed to surrender during business hours on that date. Ct. recommends that Deft. be confined at Federal Pirson Camp at Big Spring, Texas or if they are full that confinement be at FCI at Ft Worth, Texas. All sent. are to run conc., both in this case and as to the sentence imposed in 82-20011-01. |
| Mar. 16 | 58 | JUDGMENT and COMMITMENT ORDER ENTERED-EEO: Deft. BROCE CONSTRUCTION CO., Ct. #1, Fined: $750,000. One-third of fine to be paid by 12-31-82; the next one-third to be paid by 12-31-83 and remaining one-third by 12-31-84. Ct. #2—dismissed on mtn. of U.S. Attorney. |
| Mar. 17 | 60 | JUDGMENT and COMMITMENT ORDER ENTERED-EEO: Deft. RAY C. BROCE. Ct. #1, 2 yrs. impr. elig. for parole pur. 18:4205(b)(2) and fined $50,000. Ct. #2, 2 yrs. impr. elig. for parole pur. 18:4205(b)(2) and fined $1,000. Sent. of impr. on Ct. #2 to run conc. with Ct. #1. Fines imposed are to be paid prior to defts. release from prison as they are committed fines. Exec. of sent. stayed to 5-3-82 on which date deft. to surrender to designated in- |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | stitution. Ct. rec. period of incarceration be served at a minimum security institution; preferably at Big Spring, Texas and if that is unavailable, Forth Worth, Texas. |
| Jun. 07 | 68 | Return of USM on J/C. Deft. BROCE surrendered 5-3-82 to Federal Correctional Inst. Fort Worth, Texas. |
| Jun. 11 | 70 | Satisfaction of Fine of Deft. RAY C. BROCE |
| 1983 | | |
| Feb. 22 | 82 | MOTION of Defendants To Vacate Sentence pur. to Rule 35(a) |
| Mar. 21 | 85 | Gov't RESPONSE to Defts' Motion to Vacate Sentence Pur. to Rule 35(a) |
| Mar. 28 | 86 | Defts' REPLY to Gov't Response to Motion to Vacate Sentence Pur. Rule 35(a). Affidavits attached. |
| Mar. 30 | 87 | Stipulation of Parties that the Court may consider Record made at Evidentiary Hearing in USA v. Beachner 82-20076-01 |
| May 03 | 88 | at KC-EEO: Deft's Motion to Vacate Sentence Pur. to Rule 35(a)—U/A. Gov'ts oral motion to augment the evidence introduced in the evidentiary hearing before Judge Saffels by introducing the 4-6-81 Grand Jury Testimony of Michael Paul Gallagher; the 2-3-81 Grand Jury |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | testimony of Bernard Carlile; the 2-3-81 Grand Jury testimony of James A. Carlile and the 2-16-82 Grand Jury Testimony of Orville Spray Jr.—Granted and Mr. Eisenbrandt will be permitted to submit whatever additional Grand Jury transcripts he wants to submit for court's consideration. Deft's oral motion to make the presentence report a part of the record in this hearing—Gov't will be given to 5-6-83 to respond to Deft's Motion and Gov't is directed to inform Deft's of their position no later than 5-6-83. Submitted Grand Jury transcripts are to be sealed and not opened unless the court so directs. |
| Nov. 18 | 90 | MEMORANDUM AND ORDER ENTERED-EEO: Defts' Mtn. to Vacate—Denied |
| Nov. 28 | 91 | NOTICE OF APPEAL BY Deft. RAY C. BROCE & BROCE CONST. $70.00 paid. |
| 1984 | | |
| Jan. 03 | 98 | ORDER ENTERED-HOWARD K. PHILLIPS-10th CIRCUIT COURT OF APPEALS: Defts. contend that only one fine could be properly assessed and in order to avoid claim of acquiescing to Dist. Ct. this court |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | should allow $250,000.00 to be paid on or before 12-31-83 and allow a bond posted by 12-31-83 in the sum of $250,000.00 guaranteeing payment of that amount. Mtn. to stay payment of one half of the fine due to be paid on or before 12-31-83, in cases 81-20119-01 and 82-20011-01, is granted pending disposition of captioned appeals, on condition that the defts. post a good and sufficient bond in the sum of $250,000 on or before 12-31-83 in KCK—Office of Clerk, pending disposition on appeal. |
| Jan. 04 | 99 | ORDER ENTERED-EEO: $250,000 has been paid in 81-20119-01. A good and sufficient bond has been posted—Certificate of Deposit in the amount of $250,000 has been placed with Clerk payable to Clerk of District Court in 82-20011-01 until disposition of appeal. CD will serve as bond in 82-20011-01. |
| 1985 | | |
| Jan. 02 | 100 | ORDER ENTERED-HOWARD K. PHILLIPS, CLERK-10th CIRCUIT COURT of APPEALS: Mtn. for stay pending appeal is granted, on the condition that appellants post agood and sufficient bond in the |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | sum of $500,000 on or before 12-31-84, in the Kansas City office of the Clerk of the U.S. District Court for the District of Kansas, pending disposition of this appeal. |
| Jan. 08 | 101 | ORDER ENTERED—EEO: $750,000 has been paid in 81-20119-01 & 82-2011-01; Certificate of Deposit in amount of $250,000 has been placed with clerk of District Court in 81-20119-01 and 82-20011-01 until disposition of appeal; Certificate of Deposit presently with Clerk in amount of $250,000 in 81-20119-01 and 82-20011-01 has accumulated interest since 12-29-83 and clerk of Court is directed to pay interest to Deft. Broce Const. Co. upon posting of new CD in amount of $250,000. |
| Jan. 08 | 102 | ORDER ENTERED-EEO: $250,000 credited to 82-20011-02 on 12-31-82 is transferred to Criminal Action 81-20119-01 USA vs. Broce Const. Company. This will satisfy the total fine of $750,000 in 81-20119-01. |
| Jan. 11 | 103 | OPINION, of U.S. COURT OF APPEALS, 10th Circuit, for Deft. BROCE CONSTRUCTION CO. INC. |
| Feb. 04 | 106 | Satisfaction of Criminal Fine of Deft. BROCE CONSTRUCTION CO. |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| May 28 | 107 | ORDER ENTERED-HOWARD K. PHILLIPS COURT OF APPEALS—10th CIRCUIT: Appellee's petition for rehearing and suggestion for rehearing in banc is granted. Mandate issued 1-9-85 to U.S. District Court for District of Kansas in 83-2559 is recalled. Judgment entered 1-9-85 is recalled. Judgment entered 1-9-85 is vacated. Defts. Ray C. Broce and Broce Construction Co., Inc. |
| 1986 | | |
| Jan. 06 | 110 | OPINION, of U.S. Court of Appeals, 10th Circuit for Deft. BROCE CONSTRUCTION COMPANY. |
| May 01 | 114 | BRIEF of United States on Remand from the Tenth Circuit Court of Appeals for a Factual Determination with Attachments (UNDER SEAL PER ORDER OF COURT—VAULT) |
| May 29 | 117 | BRIEF For BROCE CONSTRUCTION COMPANY, INC. et al. on Remand from the Tenth Circuit Court of Appeals for a Factual Determination. |
| Jun. 30 | 118 | MEMORANDUM AND ORDER ENTERED-EEO: The judgment and sentence entered against Defts. |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | BROCE CONSTRUCTION CO., INC., and RAY C. BROCE in Case No. 82-20011-01 are vacated. The judgment and sentence entered against both Defts. in Case No. 81-20119-01 shall stand. |
| Jul. 07 | 119 | ORDER ENTERED-EEO: The Clerk is directed to release the bond in the amount of $750,000.00 to Deft. BROCE CONSTRUCTION CO., INC. in Case No. 82-20011-01. The Clerk is further ordered to return to Deft. RAY BROCE the amount of $50,000.00 that has been previously paid in Case No. 82-20011-01. |
| Aug. 08 | 120 | AMENDED NOTICE OF APPEAL filed by USA. |



UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Criminal Action No. 82-20011-01

UNITED STATES OF AMERICA

*v.*

RAY C. BROCE, BROCE CONSTRUCTION CO., INC., DEFENDANTS

**DOCKET ENTRIES**

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1982 | | |
| Feb. 04 | 1 | INDICTMENT |
| Feb. 08 | 5 | Plea Agreement between the United States of America and Deft. BROCE CONSTRUCTION CO., INC. (orig. 81-20119-01) |
| Feb. 08 | 6 | PETITION and ORDER ENTERED-EEO: Deft. BROCE CONSTRUCTION to enter plea of guilty – (Orig. filed 81-20119-01) |
| Feb. 08 | 7 | ARRAIGNMENT/PLEA AT KC-EEO: Deft. BROCE CONSTRUCTION CO. Guilty, Ct. #1 (Accepted), Judgment Deferred, P/S/I pending, Sentencing set 3-15-82 at 10:30 A.M. |
| Feb. 08 | 8 | Plea Agreement Between the United States of America and Deft. RAY C. BROCE |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| Feb. 08 | 9 | PETITION and ORDER ENTERED-EEO: Deft. RAY C. BROCE to enter plea of guilty (Orig. filed 81-20119-01) |
| Feb. 08 | 10 | ARRAIGNMENT/PLEA AT KC-EEO: Deft. RAY C. BROCE, Guilty Ct. #1 (Accepted), Judgment deferred, P/S/I pending. Sentencing set 3-15-82 at 10:30 A.M. |
| Mar. 15 | 16 | SENTENCE At KC-EEO: Deft. RAY C. BROCE, Ct. #1, 2 yrs. impr. and fined $50,000. Sent. imposed in this case to run conc. to sent. imposed in 81-20119-01. Deft. fine to be paid in full prior to Deft's release from incarceration. Ct. rec. that sent. be served at a minimum security institution and deft. will be permitted to surrender directly to designated institution. Deft. will be granted a stay to 3-29-82 and Deft. is directed to surrender during business hours on that date. Ct. recommends that deft. be confined at Federal Prison camp at Big Spring, Texas or if they are full that conf. be at FCI at Ft. Worth, Texas. |
| Mar. 15 | 17 | SENTENCE at KC-EEO: Deft. BROCE CONSTRUCTION CO. Ct. #1, Fined: $750,000. One third of fine to be paid by 12-31-82; one third of fine to be paid by 12-31-83 and |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | one third of fine to be paid by 12-31-84. |
| Mar. 16 | 18 | JUDGMENT and COMMITMENT ORDER ENTERED-EEO: Deft. BROCE CONSTRUCTION CO. Ct. #1, Fined $750,000. One-third of fine to be paid by 12-31-82; the next one-third to be paid by 12-31-83; and the remaining one-third of fine paid by 12-31-84. |
| Mar. 17 | 19 | JUDGMENT and COMMITMENT ORDER ENTERED-EEO: Deft. RAY C. BROCE. Ct. #1, 2 yrs. impr. and fined $50,000. Sent. to run conc. with sent. imposed in 81-20119-01. Fine imposed is to be paid prior to deft's release from prison as it is a committed fine. Exec. of sent. stayed until Monday, 5-3-82, on which date deft. is to surrender to designated institution no later than 2:00 P.M. Ct. rec. period of incarceration be served at a minimum security institution; preferably at Big Spring, Texas and if that is unavailable, Forth Worth, Texas. |
| Jun. 7 | 24 | Return of USM on J/C. Deft. Broce surrendered 5-3-82 to FCI, Forth Worth, Texas. |
| Jun. 11 | 25 | Satisfaction of Fine of Deft. RAY C. BROCE |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1983 | | |
| Feb. 22 | 28 | MOTION of Defendants to Vacate Sentence pur. to Rule 35(a) |
| Mar. 21 | 31 | Gov't Response to Defts' Motion to Vacate Sentence Pur. to Rule 35(a) |
| Mar. 28 | 32 | Defts' REPLY to Gov't Response to Motion to Vacate Sentence Pursuant to Rule 35(a). Attachments. |
| Mar. 30 | 33 | Stipulation of the Parties that the Court May consider Record made at Evidentiary Hearing in USA v. Beachner 82-20076-01. |
| May 3 | 34 | at KC-EEO: Deft's Motion to Vacate Sentence Pur. to Rule 35(a)—U/A. Gov'ts oral motion to augment the evidence introduced in the Evidentiary Hearing before Judge Saffels by introducing the 4-6-81 Grand Jury Testimony of Michael Paul Gallagher; the 2-3-81 Grand Jury testimony of Bernard Carlile; the 2-3-81 Grand Jury Testimony of James A. Carlile and the 2-16-82 Grand Jury Testimony of Orville Spray Jr.—Granted and Mr. Eisenbrandt will be permitted to submit whatever additional Grand Jury transcripts he wants to submit for court's consideration. Deft's oral motion to make the presentence report a part of the record in this hearing—Gov't will be given to 5-6-83 to |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | respond to Deft's Motion and Gov't is directed to inform Deft's of their position no later than 5-6-83. Submitted Grand Jury transcripts are to be sealed and not opened unless the court so directs. |
| Nov. 18 | 35 | MEMORANDUM AND ORDER ENTERED-EEO: Defts' Mtn. to Vacate—Denied |
| Nov. 28 | 36 | NOTICE OF APPEAL by Deft. |
| Dec. 30 | | CD No. 210332 in the amount of $250,000.00 placed in vault for 1983 fine payment for Broce Const. Co. pursuant to order of 10th Circuit. |
| 1984 | | |
| Jan. 03 | 43 | ORDER ENTERED-HOWARD K. PHILLIPS-10th CIRCUIT COURT OF APPEALS. Defts. contend that only one fine could be properly assessed and in order to avoid claim of acquiescing to Dist. Ct. this court should allow $250,000.00 to be paid on or before 12-31-83 and allow a bond posted by 12-31-83 in the sum of $250,000.00 guaranteeing payment of that amount. Mtn. to stay payment of one half of the fine due to be paid on or before 12-31-83, in cases 81-20119-01 and 82-20011-01, is granted pending disposition of captioned appeals, on condition that |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | defts. post a good and sufficient bond in the sum of $250,000 on or before 12-31-83 in KCK—Office of Clerk, pending disposition on appeal. |
| Jan. 04 | 44 | ORDER ENTERED-EEO: $250,000 has been paid in 81-20119-01. A good and sufficient bond has been posted—Certificate of Deposit in the amount of $250,000.00 has been placed with Clerk payable to Clerk of District Court in 82-20011-01 until disposition of appeal. CD will serve as bond in 82-20011-01 |
| 1985 | | |
| Jan. 02 | 45 | ORDER ENTERED-HOWARD K. PHILLIPS, CLERK—10th Circuit Court of Appeals: Mtn. of stay pending appeal is granted, on the condition that appellants post a good and sufficient bond in the sum of $500,000 on or before 12-31-84, in the Kansas City Office of the Clerk of the U.S. District Court for the District of Kansas, pending disposition of this appeal. |
| Jan. 02 | 46 | ORDER ENTERED-EEO: Certificate of Deposit in the amount of $500,000 has been placed with the Clerk of the Court and made payable to Clerk of the District Court in 82-20011-02, until the disposition of the appeal in |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | this case. Certificate of Deposit will serve as a bond in case 82-20011-02 and will remain with the Clerk of the District Court until there is a final determination in this case. |
| Jan. 08 | 47 | ORDER ENTERED-EEO: $750,000 has been paid in 81-20119-01 and 82-2011-01; Certificate of Deposit in amount of $250,000 has been placed with clerk of District Court in 81-20119-01 and 82-20011-01 until disposition of appeal; Certificate of Deposit presently with Clerk in amount of $250,000 in 81-20119-01 and 82-20011-01 has accumulated interest since 12-29-83 and clerk of Court is directed to pay interest to Deft. Broce Const. Co. upon posting of new CD in amount of $250,000.00. |
| Jan. 08 | 48 | ORDER ENTERED-EEO: $250,000 credited to 82-20011-02 on 12-31-82 is transferred to Criminal Action 81-20119-01 USA vs. Broce Const. Company. This will satisfy the total fine of $750,000 in 81-20119-01. |
| 1986 | | |
| Feb. 18 | 52 | OPINION, of U.S. COURT OF APPEALS, 10th CIRCUIT FOR Deft. RAY BROCE |
| May 01 | 56 | BRIEF for the United States on Remand from the Tenth Circuit Court |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | of Appeals for a Factual Determination with Attachments (Sealed Per Order of Court – Vault) |
| May 29 | 59 | BRIEF for Broce Construction Company, Inc. et al. on Remand From the Tenth Circuit Court of Appeals for a Factual Determination. |
| Jun. 30 | 60 | MEMORANDUM AND ORDER ENTERED-EEO: The judgment and sentence entered against Defts. BROCE CONSTRUCTION CO., INC., and RAY C. BROCE in Case No. 82-20011-01 are hereby Vacated. The judgment and sentence entered against both Defts. in Case No. 81-20119-01 shall stand. |
| Jul. 07 | 61 | ORDER ENTERED-EEO: The Clerk is directed to release the bond in the amount of $750,000.00 to Deft. BROCE CONSTRUCTION COMPANY INC. in Case No. 82-20011-01. The Clerk is further ordered to return to Deft. RAY BROCE the amount of $50,000.00 that has been previously paid in Case No. 82-20011-01. |
| Jul. 30 | 63 | NOTICE OF APPEAL filed by USA. |
| Aug. 08 | 64 | AMENDED NOTICE OF APPEAL filed by USA. |



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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No. 81-20119-01

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

BROCE CONSTRUCTION CO., INC.,
RAY C. BROCE AND GERALD R. GUMM, DEFENDANTS

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No. 82-20011-01

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO.
DEFENDANTS.

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**TRANSCRIPT OF PROCEEDINGS**

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February 8, 1982

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*Appearances:*

HON. EARL E. O'CONNOR,
Chief Judge

For the Plaintiff: MR. RICHARD J. BRAUN
and MS. MARY JONES,
U.S. Department of Justice,
Room 2634,
Everett M. Dirksen Building,
Chicago, Illinois 60604.

For the Defendants: MR. ROBERT TILTON
MR. KENNETH F. CROCKETT,
1324 Topeka Boulevard
Topeka, Kansas 66612.

Harold Pittell,
Official Reporter

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BE IT REMEMBERED, on the 8th day of February, 1982, the above matter coming on for hearing before the Honorable Earl E. O'Connor, Chief Judge of the United States District Court for the District of Kansas, and the parties appearing in person and/or by counsel, the following proceedings were had:

[3] MR. TILTON: Your Honor, excuse me. Mr. Broce is extremely hard of hearing, and if you could speak up I certainly would appreciate it.

THE COURT: All right.

If the defendant and counsel will come forward, please.

MR. TILTON: If you can't hear the Judge, will you tell him?

DEFENDANT BROCE: Yes.

THE COURT: Now, first of all, as I indicated to counsel by an order that I sent you just the other day, the Court failed to make an inquiry and make a record on the fact that this defendant, as well as the defendant Broce Construction Company, and also the other defendant, Gerald R. Gumm, were all represented by the same attorneys, and under the new Rule 44 of the Federal Rules of Criminal Procedure, Subsection C, it is the duty of the Court to advise each defendant of his right to the effective assistance of counsel, including the right to have a separate attorney, and also advise each defendant that



there might be a possible conflict of interest by having the same attorneys represent all defendants.

Mr. Tilton, have you gone over this rule with the defendants here?

[4] MR. TILTON: Yes, Your Honor, we did. We advised them of how the conflicts might arise and the fact that they might have different opportunities during the course of the case, that their interests might conflict, and they have assured us they understand this, that they want to have a united counsel effort, and we feel that they have been very carefully two or three times advised of their rights and the possibilities that could result in conflicts, and knowing this, they have always indicated to us that they want to waive their right to separate attorneys and have the same attorney represent the corporation and both defendants.

THE COURT: All right. So, Mr. Tilton, then, you know of no good cause why there would be a conflict of interest, then, that either has arisen or would likely arise by virtue of the representation of all defendants by the same attorneys?

MR. TILTON: No. There have been conflicts Your Honor, to the extent maybe an offer of reduced sentence, et cetera, to one. We have always explained this to the defendant that was involved, and I feel that any potential conflict has always been explained to them, they understand it, and they have always indicated they still want us to represent them, and I know of no conflict now that would make it not possible for us to [5] represent them.

THE COURT: Mr. Broce, do you agree with what Mr. Tilton has just said, that you understand that you have a right to the assistance of a separate attorney and that you are willing to waive any right that you might have as to possible conflict of interest by having the same attorney represent both you and the corporation and Mr. Gumm?

DEFENDANT BROCE: Yes, I understand it.

THE COURT: Mr. Gumm, do you agree with what Mr. Tilton has just said, that you do fully understand your right to separate counsel and you waive any right that you might have arising from any possible conflict of interest by having the same counsel represent all of you?

DEFENDANT GUMM: Yes, sir.

THE COURT: Now, this case was set for trial for this morning in Topeka. Now, Mr. Tilton, do you have a matter to present to the Court in the way of a change of plea?

MR. TILTON: Yes, Your Honor. We have entered into a plea bargaining agreement with the federal government, and we have a copy of this agreement here. It entails our pleading to—Mr. Broce, as outlined in the plea agreement, would plead to the [6] Sherman Antitrust violation, a mail fraud violation, and Mr. Gumm would plead to a Sherman Antitrust violation. The corporation would plead to a Sherman Antitrust violation. Then, on Friday, another indictment has been returned against Ray Broce and Broce Construction Co. to which Ray Broce and Broce Construction Co. have agreed to plead to charges of Sherman Antitrust violation. In return for that and our cooperation as outlined in the plea agreement, the government has agreed not to have any further prosecutions of any of these defendants or the Broce Construction Co., Inc., in either Kansas or Nebraska—excuse me, Oklahoma, or any of their subsidiaries or any of their employees or agents, and this is in the form of a written agreement, Your Honor.

THE COURT: All right. Now, let's take up the plea, then, by Mr. Broce personally, and also you are authorized to speak for and on behalf of the Broce Construction Co., is that correct?

MR. TILTON: That's correct. He is president, Your Honor.



THE COURT: Now, as I understand it, then, the plea by Broce Construction Co. is that of guilty to Count 1, which is the Sherman Antitrust violation, is that correct?

MR. TILTON: That's correct, Your Honor.

[7] THE COURT: And that is on behalf of the corporation?

MR. TILTON: That's correct.

THE COURT: Is the corporation pleading guilty, then, to the mail fraud?

MR. TILTON: Yes, Your Honor, yes, I overlooked that, excuse me.

THE COURT: And then Mr. Broce personally is entering a plea of guilty to the—to Count 1, the Sherman Antitrust Violation, is that correct?

MR. TILTON: That's correct.

MR. CROCKETT: And Count 2, also, Your Honor.

THE COURT: And also Count 2, the mail fraud?

MR. BRAUN: Your Honor, I think there may be some misunderstanding. With respect to the corporation, the corporation has—the corporation, as I understand it, pursuant to the plea agreement, is not pleading to the mail fraud count.

THE COURT: Let's get it straight. I don't want you pleading guilty to some—

MR. TILTON: That's correct. The corporation, under our written agreement, we are only pleading to the Sherman Antitrust violation and they [8] will dismiss Count 2.

THE COURT: So the corporation and Mr. Broce are pleading guilty to Count 1 and Mr. Broce personally is pleading guilty to both Count 1 and Count 2?

MR. CROCKETT: That's correct, Your Honor.

THE COURT: Is that right, Mr. Broce?

DEFENDANT BROCE: Right.

THE COURT: Now, Mr. Broce, I'm going to ask you a number of questions here. I think maybe we can take the

plea, if there is going to be a plea on this other case, at the same time and then we will ask the questions that will apply to both cases, and this is case 82-20011-01, and this is the charge, the indictment that was returned February 4 against Ray C. Broce and Broce Construction Co., Inc., and this is one count, and as I understand, now, Mr. Broce on behalf of himself and also the construction company desires to enter a plea of guilty to this one count which is another Sherman Antitrust violation, is that correct?

MR. TILTON: That is 82-20011-02, Your Honor?

THE COURT: 01 and 2, right.

MR. TILTON: That's correct.

THE COURT: Mr. Broce, the Court is going to ask you some questions in regard to these pleas of [9] guilty in both of these cases, and they are being asked of you and you will be answering these questions on behalf of yourself personally and also the corporation. Now, you understand that?

DEFENDANT BROCE: Yes, sir.

THE COURT: Now, you have indicated in case 81-20119-01, and that is the older case of the two, that it is your desire to enter on behalf of yourself guilty pleas to Count 1 and 2, and on behalf of the corporation a guilty plea to Count 1, and also in the new case, which is 82-20011-01, that both you yourself personally and on behalf of the corporation wish to enter a plea of guilty to just the one charge, and that is the only charge in the indictment. Now, is that correct?

DEFENDANT BROCE: Right, correct.

THE COURT: Mr. Broce, although now you indicate your desire to enter pleas of guilty on behalf of yourself and also the corporation, the Court does want to advise you and impress upon you that you do have a right to plead not guilty, both on behalf of yourself and the corporation, and in the event of a not guilty plea, the Con-



stitution does guarantee you certain rights, namely, the right to a speedy and public trial by a jury, and at that trial and at all stages of the proceedings [10] you would have the right to the assistance of a lawyer; you would also have the right to see and hear all witnesses that might be called to testify against you, and the right to cross-examine those witnesses. You would also have the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in your favor, and also so far as you personally are concerned, you would have the right not to be compelled to take the witness stand and testify and possibly incriminate yourself, and if you did choose not to testify, the jury would be instructed that no inference of guilt could be drawn from your failure to do so and, further, then, at any trial your innocence would be presumed until such time, if ever, as the government established your guilt by competent evidence to the satisfaction of the Judge or jury beyond a reasonable doubt.

Now, Mr. Broce, do you understand these rights that are guaranteed to you under the law if you plead not guilty?

DEFENDANT BROCE: I do.

THE COURT: And do you understand that by entering pleas of guilty that you would be waiving or giving up all of these constitutional rights that I have just explained to you?

[11] DEFENDANT BROCE: I do.

THE COURT: And do you further realize that as to these charges where you are entering pleas of guilty that you would be admitting all the facts alleged in these charges and you would be waiving or giving up your right to a trial on the charges? In fact, there would be no further trial of any kind, either to the Court or to a jury, do you understand that?

DEFENDANT BROCE: I do.

THE COURT: And do you understand that even though you are entering these pleas of guilty, that the Court nevertheless could go ahead and render the same type of punishment or the same punishment just as if pleas of not guilty had been entered and you stood trial and been convicted by a jury, do you understand that?

DEFENDANT BROCE: I do, yes, I do.

THE COURT: Now, I want to explain to you what the law provides in the way of maximum punishment for these offenses. As to the Sherman Antitrust violations, so far as the corporation is concerned, the maximum punishment is a fine up to one million dollars on each charge, do you understand that?

DEFENDANT BROCE: I do.

THE COURT: And as to you individually, on the Sherman antitrust violations, the maximum punishment [12] is a fine up to one hundred thousand dollars and a term of imprisonment up to three years on each charge, do you understand that?

DEFENDANT BROCE: I do.

THE COURT: Now, on the mail fraud count, there is a mail fraud count here on one of these charges, I want you to understand that the maximum punishment for that offense is a fine up to one thousand dollars and a term of imprisonment up to five years, do you understand that?

DEFENDANT BROCE: I read that, yes, sir.

THE COURT: Now, as I understand from counsel that these pleas of guilty are the result of plea agreements between the defendants and their attorneys and government counsel, is that correct, Mr. Braun?

MS. JONES: That's correct, Your Honor.

THE COURT: And that is attached to the plea of guilty petition.



MR. TILTON: They haven't been attached but they are here, Judge.

THE COURT: We will go over those in a few minutes.

Mr. Broce, these pleas of guilty, as I understand, are the result of a plea agreement that you have entered into with the government. I do want to ask you, other than what has been stated in these plea agreements, has there been any sort of promise or inducement made to you other than what is stated in those agreements for you to enter these guilty pleas today?

DEFENDANT BROCE: I don't know of any.

MR. TILTON: Your Honor, I would like to say, although this agreement doesn't have it in it because of time constraints, it is agreed between the government and the defendants, and I think they will acknowledge that and I would like that on the record, that there will be no prosecutions of any subsidiaries or agents of the defendant Broce Construction Co. or its subsidiary agents in consideration of these pleas, and that should be a part of the agreement although it is not in the written agreement.

THE COURT: Is this correct, Counsel? Mr. Braun?

MR. BRAUN: Yes. We agree the agreement – Broce's subsidiaries and its officers, agents and directors, when we say in the agreement Broce Construction Co.

THE COURT: Mr. Broce, are you telling the Court that you on behalf of yourself and also on behalf of the coporation are entering these pleas of guilty freely and voluntarily, is that correct?

[14] DEFENDANT BROCE: Correct.

THE COURT: The only reason you are entering these pleas of guilty is because you and the corporation are guilty of these offenses, is that correct?

DEFENDANT BROCE: Correct.

THE COURT: Do you understand that in connection with your plea of guilty that the Court is going to ask some

questions concerning these offenses and your participation in them? You will be answering these questions under oath, on the record and in the presence of your attorney, and these answers, if not correct, could be used against you later in a prosecution for perjury or false statement, do you understand that?

DEFENDANT BROCE: I do.

THE COURT: Now, have you gone over with your attorneys a written petition to enter pleas of guilty in each of these cases?

MR. TILTON: Yes, he has, Your Honor.

DEFENDANT BROCE: Yes.

THE COURT: And do you have any questions at all that you want to raise at this time about any of the matters covered in those written petitions?

DEFENDANT BROCE: No.

THE COURT: And do you understand that the answers that you are making to the questions in those [15] petitions, both by you personally and also on behalf of the corporation, that they are being made here in Court under oath?

DEFENDANT BROCE: Yes.

THE COURT: Now, you may go ahead and sign the petitions if you have not done so and then the clerk will swear you and place you under oath.

MR. BRAUN: Your Honor, may I raise one preliminary technical matter?

THE COURT: All right.

MR. BRAUN: Neither of the defendants, Broce or Broce Construction Co., has been arraigned with respect to the indictment which was returned last Thursday and it might be appropriate to have them waive at this time the reading of that indictment.

THE COURT: In the case 82-20011-01, this is the first appearance by Mr. Broce and also the construction company, so there has been no arraignment on this charge, the Sherman Antitrust charge, one count, and for the record, then, I take it that the defendants have been furnished copies of this charge, and is it your desire to waive the reading of the indictment as to both defendants?



DEFENDANT BROCE: Yes.

THE COURT: He has already indicated that [16] both on behalf of himself and also the construction company, that as to that case, he wishes to enter a plea of guilty to that charge, is that correct?

MR. TILTON: That's correct, Your Honor.

DEFENDANT BROCE: That's correct.

(Defendant Broce was duly sworn.)

THE COURT: Let's see, do you have written petitions on both cases or just this new one?

MR. CROCKETT: Your Honor, the one that is typed in is based on the older indictment.

THE COURT: I see.

MR. CROCKETT: And what I have done is penned in a statement referring to the new indictment and also inserted the case number on it, the most recent indictment.

THE COURT: Let me just go over this briefly.

In these petitions to enter pleas of guilty, Counts 1 and 2 in the older case, Mr. Broce on behalf of himself and also on behalf of the corporation states in substance that "We agreed to suppress competition for a Meade County project with other contractors. This project was let by the state of Kansas April 25, 1978. Bids were discussed with other contractors in order to conspire to have the project awarded to the Broce Company and that this was done with Mr. Broce's knowledge and [17] consent. A false statement was then submitted on the bid and a payment was sent by mail to the company with Mr. Broce's knowledge and consent." Also states that his acts and the acts of

the company suppressed competition on the project's price and made the contract subject to an artificial price, denying the state and the United States free and open competition on the contract and, further, it states that both on behalf of himself and also the corporation, he is also pleading guilty to the indictment, the one charge in the indictment, in case 82-20011-01, which is the new indictment, wherein competition was suppressed in reference to the Barton County project.

Now, is this correct, Mr. Broce, what I have just read?

DEFENDANT BROCE: Right.

THE COURT: Do we have the government's statement of the facts there?

MR. TILTON: Yes, we do.

(Handed to the Court.)

THE COURT: This applies to both cases, right?

MR. CROCKETT: That's correct, Your Honor.

MR. TILTON: Yes.

THE COURT: Let me just go over it a minute.

[18] Mr. Broce, have you gone over this statement of facts in support of the pleas, it's a 4-page instrument here, have you gone over that with your attorneys?

DEFENDANT BROCE: I guess I have.

THE COURT: Well, I want to be sure you have, and I want to know, are these statements correct here as to what you did and how this all came about?

DEFENDANT BROCE: Well, this Meade County project, to the best of my knowledge, Mr. Carlile came to me and asked me if we would allow him to have the Meade County project, and I told him to talk to my manager, Mr. Gumm, that we—I understood him to say that we were needing work pretty bad and he would like to have the Meade County project, so I guess I inferred that it would be all right with me if it was all right with Mr. Gumm, so



he mentioned let us have that and next month the job in Gray County we would be willing to let you have that, and I told him we would let each county stand on its own as far as my part is concerned, but he would have to talk with my manager, Mr. Gumm, I'm not in there very often and that I don't recall talking to anyone else except Mr. Carlile.

THE COURT: Now, other than that, this statement of facts, you do agree with that, is that correct?

[19] MR. TILTON: Your Honor, Mr. Broce also tells me that he doesn't recall talking to Orville Spray, president of the Venture Corporation. He thinks it was Mr. Gumm that talked to him instead of him.

DEFENDANT BROCE: I'm awful sure I didn't. The only one I remember talking to at all was Mr. Carlile.

THE COURT: Other than these two things, now, that you have just raised, the rest of this is substantially correct, then, is that correct?

DEFENDANT BROCE: Right.

THE COURT: Do we have the plea agreement on file, too? I want that. I haven't seen that, other than what you have told me.

MR. CROCKETT: I might comment for the record, Your Honor, we did have copies attached to the petitions. However, some changes were made this morning and we removed the copies and do intend to attach to what you now have as the originals.

THE COURT: I want the plea agreements attached and in the file and also the statement of facts that were just outlined here.

MR. CROCKETT: That is fine.

THE COURT: For the record, the defendant has signed both on behalf of himself and the corporation [20] these three separate plea agreements.

MR. CROCKETT: That's correct. I might comment for the record, also, Your Honor, that we inadvertently

handed you just a while ago Mr. Gumm's plea agreement as well, and that is the third one you have.

THE COURT: Let me put that to the side.

MR. BRAUN: Your Honor, may we have just a moment?

(Stood informally at ease.)

MR. TILTON: Could we take a short recess for about two or three minutes?

THE COURT: All right.

Let's take about five minutes.

MR. TILTON: That would be fine.

THE COURT: We will be in recess for five minutes.

(Recessed.)

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THE COURT: Now, do you have a statement to make, Mr. Tilton?

MR. TILTON: Yes, Your Honor, the defendant Mr. Broce has looked at this statement and he was a little confused as between the Meade and Barton County job and this statement is substantially correct.

DEFENDANT BROCE: Right.

[21] MR. TILTON: Is that correct, Mr. Broce?

DEFENDANT BROCE: Right.

THE COURT: Mr. Broce, for the record, have you ever received any type of mental treatment or anything like that or for any kind of a mental illness?

DEFENDANT BROCE: Never.

THE COURT: Now, you have gone over these matters thoroughly with your attorneys, have you, Mr. Broce?

DEFENDANT BROCE: Yes.

THE COURT: And your decision now to enter pleas of guilty, both on behalf of yourself personally and also on behalf of the corporation, those decisions to enter pleas of guilty, those are your decision and not your attorneys'?



DEFENDANT BROCE: Absolutely my decision.

THE COURT: Mr. Tilton, as one of the defendants' attorneys, do you know of any reason, then, why the Court should not accept these pleas of guilty that have just been indicated?

MR. TILTON: Your Honor, I do not.

THE COURT: The Court is satisfied and finds that the defendant, on behalf of himself and also the corporation in both of these cases, is entering pleas of guilty freely and voluntarily, that he understands [22] the nature of the charges, the rights of the defendants with regard thereto, and also the consequences of these pleas.

The Court further finds that there are factual bases for each of these pleas of guilty. In case 81-20119-01, that is the older case, as to the defendant personally, the Court accepts his pleas of guilty to Counts 1 and 2 of the indictment, and in that same case, the Court also accepts the pleas—plea of guilty of the construction company, the corporation, as to Count 1.

As to the new case, 82-20011-01, the Court is accepting the plea of guilty to the one count on behalf of Mr. Broce personally and also on behalf of the corporation.

A pre-sentence investigation is ordered to be made as to both defendants. Sentencing is set for Monday, March 15, at 10:30 in the morning, and before Mr. Broce leaves, he must talk to the probation people, they will want some information to begin their investigation, and, for the record, the same conditions of release will apply on the new case, that is, 82-20011-01, as apply in the older case, 81-20119-01, and I think that is an O.R. bond, and the Court will set the same amount for this new case and with the same conditions of [23] release, and I do have a bond form and conditions of release which the defendant will need to sign before he leaves today. I'll give those to you, Mr. Tilton.

MR. CROCKETT: Your Honor, as I recall, in that regard, the only special condition of the bond under the first indictment was that the restriction to travel was limited to the continental United States rather than the District of Kansas.

THE COURT: Yes, I think that's right.

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THE COURT: Let's take up Mr. Gumm's plea in 81-20119-01.

Mr. Crockett, Mr. Gumm desired to enter a plea of guilty as to Count 1, is that correct?

MR. CROCKETT: Count 1 and 2.

THE COURT: In both counts, okay.

Mr. Gumm, it is your desire now to enter a plea of guilty to both the Sherman Antitrust violation and also the mail fraud violation, Counts 1 and 2 in the indictment, is that correct?

DEFENDANT GUMM: Yes, sir.

THE COURT: Mr. Gumm, we will have to go through very much the same colloquy we went through as you were present here with Mr. Broce, but the Court does want to advise you, of course, that you may maintain [24] your previous plea of not guilty on the two charges in this indictment, and, of course, in the event of a not guilty plea, you are guaranteed certain rights under the Constitution, namely, the right to a speedy and public trial by jury and at that trial and at all stages of the proceedings, you would have the right to the assistance of a lawyer. You would also have the right to see and hear all witnesses that might be called to testify against you, the right to cross-examine those witnesses. You would have the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in your favor. You would also have the right not to be com-



pelled to take the witness stand and testify and possibly incriminate yourself at a trial. If you chose to exercise that right, the jury would be instructed that no inference of guilt could be drawn from your failure to do so, and, further, at any trial, your innocence would be presumed until such time, if ever, as the government came forth with sufficient evidence to establish your guilt to the satisfaction of the Judge or jury beyond a reasonable doubt.

Mr. Gumm, do you understand these rights that are guaranteed to you under the law if you plead not guilty?

[25] DEFENDANT GUMM: I understand, sir.

THE COURT: And do you understand that by entering a plea of guilty that you would be waiving or giving up all of these constitutional rights that I have just explained to you?

DEFENDANT GUMM: I understand.

THE COURT: And do you further realize that by entering pleas of guilty to these two counts that you would be admitting all the facts alleged in these counts, you would be waiving your right to a trial on these charges and, in fact, there would be no further trial of any kind either to the Court or to a jury?

DEFENDANT GUMM: Yes, sir.

THE COURT: You also realize that even though you plead guilty that the Court may still impose the same punishment as if you had pleaded not guilty, stood trial and been convicted by a jury?

DEFENDANT GUMM: Yes, sir.

THE COURT: Now, the maximum punishment for the Sherman Antitrust violation is a fine up to one hundred thousand dollars and a term of imprisonment up to three years. On the mail fraud violation, the maximum punishment is a fine up to one thousand dollars and a term of imprionment up to five years, do you understand that?

[26] DEFENDANT GUMM: Yes, sir.

THE COURT: I take it that these pleas of guilty are the result of plea agreement between the defendant, his attorney, and government counsel, is that correct?

MR. CROCKETT: That's correct, Your Honor.

THE COURT: And has this been reduced to writing?

MR. CROCKETT: It has. That is the plea agreement that we handed to you with Mr. Broce's and the corporation's.

THE COURT: Mr. Gumm, you have gone over this plea agreement, is that correct, with your attorneys?

DEFENDANT GUMM: Yes, sir.

THE COURT: Other than what has been stated now in this plea agreement, has anyone made any sort of promise or inducement to you in order to get you to enter these pleas of guilty?

DEFENDANT GUMM: No, sir, they have not.

THE COURT: Are you telling the Court, then, that you are entering these pleas of guilty freely and voluntarily?

DEFENDANT GUMM: Yes, sir.

THE COURT: And that the only reason you are entering these pleas of guilty is because you are in fact [27] guilty of these charges?

DEFENDANT GUMM: Yes, sir.

THE COURT: You understand that in connection with these proceedings that the Court is going to ask you some questions concerning your participation in these offenses. You will be answering these questions under oath, on the record and in the presence of your attorney, and these answers, if not true, could later be used against you in a prosecution for perjury or false statement.

DEFENDANT GUMM: Yes.

THE COURT: Have you gone over with your attorneys a written petition to enter pleas of guilty?

DEFENDANT GUMM: Yes.



THE COURT: And do you have any questions about any of the matters covered in that petition?

DEFENDANT GUMM: No, sir.

THE COURT: And do you understand that the answers that you are giving to the questions in that petition are being made here in court under oath?

DEFENDANT GUMM: Yes, sir.

THE COURT: You may go ahead and sign it if you have not done so, and then the clerk will swear you.

MR. CROCKETT: Your Honor, I have presented the petition to the Clerk and I would comment for the [28] record that as in Mr. Broce's situation, the plea agreement—plea bargain agreement is not attached to the petition. However, we do intend to so attach it.

THE COURT: I have the original here.

(Defendant Gumm was duly sworn.)

THE COURT: Mr. Gumm, you indicate here as to Counts 1 and 2 that you agreed to suppress competition for a Meade County project with other contractors. This project was let by the state of Kansas April 25, 1978. Bids were discussed with other contractors in order to conspire to have the project awarded to the company that you were secretary of. This was done with your knowledge and consent. A false statement was then submitted on the bid and a payment was sent to the company by mail with your knowledge and consent, and that your acts suppressed competition on the project's price and made the contract subject to an artificial price denying the state and the United States free and open competition on the contract. Now, is that correct?

DEFENDANT GUMM: Yes, sir, basically.

THE COURT: Mr. Crockett, the statement of facts that was applicable to Mr. Broce's plea is also the basis for this plea, is that correct?

MR. CROCKETT: That's correct, Your Honor. And I might state in reference to that, that Mr. Gumm's [26] position is that the statement of facts in support of the pleas is substantially correct. The only statement with which he takes any exception is the second sentence of the first page, reference the statement that the project was a federal aid secondary project. We are not disputing that other than to simply say we didn't know.

THE COURT: You have gone over those statements of facts with your attorney, Mr. Gumm, have you?

DEFENDANT GUMM: Yes.

THE COURT: And you do acknowledge that they are correct, other than this one, you don't know one way or the other?

DEFENDANT GUMM: Yes, substantially correct, yes, sir.

THE COURT: For the record, have you ever had any treatment for any type of mental illness?

DEFENDANT GUMM: No, sir.

THE COURT: Mr. Gumm, you have gone over this matter carefully now with your attorneys, have you, and decided that what you want to do is to enter pleas of guilty to these two counts, is that correct?

DEFENDANT GUMM: Yes, sir.

THE COURT: This decision to enter pleas of guilty, now, this is your decision and not your attorneys'?

[30] DEFENDANT GUMM: That's correct, my decision.

THE COURT: Mr. Crockett, as one of the defendant's attorneys, do you know of any reason, then, why he should not enter pleas of guilty to these two counts?

MR. CROCKETT: I know of none, Your Honor.

THE COURT: The Court is satisfied and finds that the defendant is entering his plea of guilty to Counts 1



and 2 of the indictment freely and voluntarily, that he understands the nature of the charges, his rights in regard thereto, and also the consequences of his pleas. The court further finds that there is a factual basis for his pleas of guilty and that he is mentally competent to enter these pleas of guilty.

His pleas of guilty, then, to Counts 1 and 2 are accepted. He is adjudged guilty of the crimes charged, a presentence investigation is ordered to be made, and sentencing is set for March 15, 1982, at 10:30 in the morning. Likewise, he will need to see the probation office and give them some information before he leaves.

MR. CROCKETT: We will do that, Your Honor. Thank you.

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**REPORTER'S CERTIFICATE**

I hereby certify that the above 30 pages are a true and correct transcript of the proceedings in the above-entitled cause on the date as indicated.

/s/ HAROLD PITTELL

Harold Pittell
Office Reporter
United States District Court
District of Kansas

## OFFICIAL VERSION OF THE OFFENSE

The defendants Ray C. Broce and Broce Construction Co., Inc. are in large part responsible for making bid rigging a "way of life" in the highway construction industry. As early as the late 1960's and continuing through the early 1970's, Broce Construction was a member of a highway construction bid rigging conspiracy known as the Big Five. During this period, Ray C. Broce was president of the company. Broce Construction, together with J. H. Shears' Sons, Inc., Reno Construction Company, San Ore Construction Company (now out of business), and Prairie States Construction Co., orchestrated the allocation of much of the highway work let by the State of Kansas. The Big Five's conspiratorial system was to allocate one ton of asphalt work to each non-member highway contractor for each three tons of asphalt work to a Big Five member. By so doing, the Big Five was able to suppress the growth of smaller, possibly more efficient, contractors and to insure each member construction work and profit thereon. If a smaller contractor balked at the 3 to 1 allocation, each member of the Big Five took a turn underbidding that small contractor and subsidizing those low bids with the excess profits realized on the rigged projects, until the small contractor was forced to go out of business or to join the conspiracy. When San Ore exited the industry in about 1973, this conspiracy ended; nevertheless, the contractors continued to set up projects on a job by job basis, with these defendants taking the lead in using their influence and economic power to keep smaller contractors in line.

The large contractors, including Broce Construction, also continued to suppress competition in the industry by pressuring smaller contractors to agree to allow the larger contractors to have the sizable jobs. Should a smaller



contractor refuse to go along with such agreements, the large contractor simply bid so low on the jobs on which the small contractor was qualified to bid, that the small contractor had to take the project at a loss or had to refrain from underbidding the large contractor and thus procure no work. In this manner Broce Construction and Ray C. Broce, the company's principal stockholder, were able to maintain a profitable business without the necessity of lowering their profit margin or otherwise striving to be one of the most efficient Kansas contractors.

The two separate conspiracies giving rise to the Indictment both illustrate the leverage Broce Construction exerted in its position as a large and, at least as perceived by the smaller contractors, powerful contractor.

### The Meade County Project

The conspiracy which resulted in Broce Construction Co. being the successful bidder on the Meade County project pitted Ray Broce and Jerry Gumm against James Carlile, a relatively small contractor. The Meade County project was let by the State of Kansas on April 25, 1978. The following bids were submitted on the Meade County project:

1. Broce Construction Company, Inc.
   $1,072,684.15
2. Carlile Asphalt Company, Inc.
   $1,083,120.65
3. Prairie States Construction Co.
   $1,100,167.90
4. Siebert Sand Company, Inc.
   $1,110,221.00
5. Popejoy Construction Company, Inc.
   $1,110,788.81

The State's cost estimate was $1,016,836.00. Based on a comparison of low bids on projects which were bid com-

petitively to low bids on projects which were rigged, we have found that competitive low bids average about 90-95% of the State's cost estimate. On that basis the economic loss to the State on this project in western Kansas, was about $75,000.

Ray Broce and Jerry Gumm attended the April 25, 1978 letting, arriving the night before at the Ramada Inn, Topeka, Kansas. That night James Carlile, vice president of Carlile Asphalt Co., Inc., went to Gumm's motel room to tell Gumm that Carlile was interested in the Meade County project. Gumm told Carlile that Broce Construction wanted the project. Carlile replied that he would bid it competitively, but Gumm told Carlile that there was no way Carlile would get the Meade County project because Broce Construction would not let Carlile have it. Carlile responded that he intended to bid competitively on the Gray County project to be let in May, 1978, in which Broce Construction was also interested.

Around midnight, following the initial discussion between Carlile and Gumm, Ray Broce contacted Edward Berry, telling Berry that the Meade County project which Broce was supposed to get was not coming through. Broce proposed taking one half of the Pawnee-Edwards County projects, but Michael Gallagher objected.

In the early morning hours of April 25, 1978, Ray Broce talked to James Carlile in the Broce Construction Company suite of rooms to persuade Carlile to get off the Meade County project. Jerry Gumm was present during portions of the conversation. Ray Broce remained adamant about Broce Construction having the Meade County project and refused to discuss the upcoming Gray County project. Broce finally got Carlile to agree that Broce Construction would be the low bidder on the Meade County project and Carlile Asphalt the low bidder on the Seward



County project, also let on April 25, 1978. Each agreed to submit complementary bids for the other.

At approximately 5:00 or 6:00 a.m. that morning, Carlile and Jerry Gumm exchanged numbers to bid above when each submitted a complementary bid. Following this conversation, James Carlile believed that he had an agreement with Ray Broce and Gerald Gumm not to bid below Broce Construction on the Meade County project and that Broce Construction would not bid below Carlile Asphalt on the Seward County project. Carlile had to raise his intended bid on the Meade County project to get above the number given to him by Gerald Gumm.

Jerry Gumm also had separate conversations regarding the Meade County project with Donald Popejoy, president of Popejoy Construction Co., Inc., and Ronald Siebert, president of Siebert Sand Co., Inc., on the night before the letting. In his conversation with Popejoy, Gumm asked for a complementary bid, and Popejoy told Gumm the figure that Popejoy intended to submit. This figure was already higher than the amount Broce Construction intended to bid. Popejoy agreed not to cut his bid below the amount Gumm said Broce Construction would bid.

Siebert contacted Gumm to ask for a complementary bid on the Cheyenne County project, also let on April 25, 1978, which Siebert wanted. Gumm agreed to do so and asked for a complementary bid from Siebert on the Meade County project, to which Siebert agreed. Gumm and Siebert then exchanged numbers to bid above on the respective projects.

Broce Construction Co. submitted its bid proposal on the Meade County project signed by Gerald Gumm, which contained a representation that there had been no collusion in the submission of the bids. As a result of the

award, Broce Construction performed the work on the Meade County project, and submitted vouchers for payment to the Kansas Department of Transportation. Payment was made by State checks (warrants) sent by mail from the Kansas Department of Transportation to Broce Construction Co. in Dodge City, Kansas. Ray Broce and Gerald Gumm were aware of the State's custom and practice of mailing such warrants.

**The Barton County Project**

In order to successfully set up the Barton County project, Ray Broce offered financial inducement to a smaller contractor to secure that contractor's agreement not to bid competitively.

The Barton County project was let by the State of Kansas on July 17, 1979; and the following bids were received:

1. Broce Construction Company, Inc.
   $1,639,968.55
2. Venture Corporation
   $1,659,936.26
3. Siebert Sand Company, Inc.
   $1,737,447.75

The State's cost estimate for the project was $1,635,164.45. Based on a comparision of low bids submitted on projects which were bid competitively to low bids on projects which were rigged, we estimate the economic loss to the State was approximately $150,000.

On the night prior to the letting, Ray Broce approached Orville Spray, Jr., president of Venture Corporation, and asked Spray to get off the Barton County project to allow Broce Construction to be low bidder. Spray refused and told Broce that he was interested in the project. Ray Broce then offered Spray his choice of $75,000 or a subcontract



for the widening and the shoulder work on the project if Spray would submit a complementary bid. Spray agreed to let Broce Construction have the project. Sometime later that night, Gerald Gumm provided Spray with a number to bid above.

Approximately one week after the July 17, 1979 letting, Spray met with Broce and Gumm in Dodge City, Kansas. Gumm had the authority to carry out the deal Broce had made with Spray. Gumm arranged with Spray for Spray to invoice Broce Constructon to sell sand at a high price and to rent equipment that Broce Construction would not use. Together, the invoices would result in payments totaling $75,000 from Broce Construction to Spray.

The other bidder on the project, Ronald Siebert, president of Siebert Sand Co., does concede that his bid was a complementary bid although he does not have a specific recollection of the circumstances.

Jerry Gumm also approached James Carlile on the night before the letting to ask whether Carlile Asphalt was interested in the Barton County project. Carlile told him no.

Broce Construction Co. submitted its bid proposal signed by Gerald Gumm which contained a representation that there had been no collusion in the preparation of the bid.

**Culpability and Cooperation**

Broce Construction Company and its president Ray Broce have been involved in bid rigging more extensively than most other Kansas contractors. By admission of its officer, Gerald Gumm, Broce Construction Company has participated in collusive bidding on twenty-six highway construction projects during the period from May, 1977 until as recently as July, 1980. Eight projects, including the two which are the subjects of these Indictments, were set up by Ray Broce or Gerald Gumm or both for Broce

Construction to be the successful bidder. On the remaining projects, Broce Contruction submitted complementary bids for other Kansas contractors.

Ray Broce arranged to pay off another contractor to stay off a project in July, 1980, after Broce was aware of bid rigging investigations and convictions in other states. The Ford County project, worth over $3.5 million, was let on July 17, 1980, and was of great interest to Broce. Ray Broce made the original agreement with Thomas Callaghan, then area manager of Prairie Construction Co., on the night before the letting. Broce offered to let Prairie States subcontract the concrete work for about $400,000 if Prairie States would not bid competitively on the project. Callaghan agreed to take the money in the form of a subcontract and not to bid the Ford County job. Broce then told Jerry Gumm to work out the details of the agreement with Callaghan.* Later, a $120,000 payment from Broce Construction Co., Inc. to Prairie States was arranged in lieu of the subcontract.

On February 8, 1982, Ray C. Broce pleaded guilty to the Sherman Act count and the Mail Fraud count of the Meade County Indictment and pleaded guilty to a second Indictment charging a Sherman Act violation (the Barton County Indictment). Broce Construction Co., Inc. pleaded guilty on that date to the Sherman Act count of each Indictment. Both pleas were entered pursuant to plea agreements between the United States and Ray C. Broce and Broce Construction Co., Inc. Ray Broce was interviewed by the staff on February 9 and 10, 1982 in the presence of his attorneys and FBI Special Agent Jerry Wiley. Broce did not recall specific details, with a few exceptions, regarding most projects. He frequently replied

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* *See* The Official Version of the Offense for Gerald R. Gumm for his role in the Ford County project conspiracy.



that we would have to ask Jerry. While we believe Broce has been candid, his cooperation provides only some corroboration of information previously received and does not substantially advance the investigation in Kansas. Broce and his company, as well as Gumm, have agreed in the plea agreements to cooperate with respect to information they have regarding Oklahoma, where Broce Construction also bids a substantial amount of work. Broce has been able to provide some additional details concerning bid rigging in Oklahoma and because the investigation is in its formative stages has been of more assistance to the Government than he has been with respect to the Kansas investigation.

Ray Broce blames Gerald Gumm and his attorneys for their refusal to accept an earlier offer from the Government on a more attractive plea arrangement which would have resulted in earlier and more valuable cooperation. The attached statement from Steve Smith, vice president of Smith Sand Co., is inconsistent with that position. It appears that the position of Broce and Gumm was an expectation that if no one talked, the investigation would "blow over" as had some previous investigations. The possible bribe of a federal prosecutor also appeared to be a reasonable option to defendants Broce and Gumm.

Mr. Braun

I

Sometime early last year when I learned that I was going to be supeoned to Kansas City to the grand jury I went to Dodge City Kansas to see Jerry Gumm. He wasn't there that day but I talked to Allen Bradley a little bit about what a grand jury was and what to expect when I went to K.C.. He also gave me the name of their lawyer in Topeka so, I could have my lawyer call him to see what was going on.

II

S.S. A few weeks later I went back to Dodge City to see if Jerry Gumm was there. He said it probably would blow over but if it didn't Broce probably would help this Mr Braun the Federal Prosecutor get started in private practice. He said something about $100,000 should help him get started in private practice rather nicely.

III

My lawyer & me went to K.C. to the grand jury the first time; but early that Morning we met Broces lawyer for coffee at our Motel. He told Ward Loyd (my lawyer) He said that his clients were taking the 5th Amendment and would rather go to jail before they would testify against Broce Const. Co. He said far as he knew everybody that went to the grand jury had taken the 5th Amendment.

II

Also when I met with Jerry Gumm he mentioned that they (Broce) were going to get their trial moved from K.C. to Wichita Federal Court because the Judge their wasn't as tough as Judge O Connor in K.C. He said O Connor is



used to dealing with the mafia and gives stiff sentences. Also in our conversation he said that Broce told him not to worry about anything because he had $1,000,000 set back to pay their fine. Thats about all I can remember.

Signed /s/ STEVE SMITH
Steve Smith

December 17, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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No. 81-20119-01

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

BROCE CONSTRUCTION CO., INC.,
RAY C. BROCE AND GERALD R. GUMM, DEFENDANTS

---

No. 82-20011-01

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO.,
DEFENDANTS

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**TRANSCRIPT OF PROCEEDINGS**

---

March 15, 1982

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*Appearances:*

HON. EARL E. O'CONNOR,
Chief Judge

For the Plaintiff: MR. RICHARD J. BRAUN
U.S. Department of Justice,
Room 2634,
Everett M. Dirksen Building,
Chicago, Illinois 60604.



For the Defendants: MR. ROBERT TILTON AND
MR. KENNETH F. CROCKETT,
1324 Topeka Boulevard
Topeka, Kansas 66612.

Harold Pittell,
Official Reporter

---

[2] BE IT REMEMBERED, on the 15th day of March, 1982, the above matter coming on for hearing before the Honorable Earl E. O'Connor, Chief Judge of the United States District Court for the District of Kansas, and the parties appearing in person and/or by counsel, the following proceedings were had:

[3] THE COURT: United States of America versus Broce Construction Co., Inc., Ray C. Broce, and Gerald R. Gumm, and 82-20011-01, United States versus Ray C. Broce and Broce Construction Co., Inc. Let's take up the two cases as to the defendant Broce Construction and Ray C. Broce.

On February 8, 1982, in case 81-20119-01, the defendant Broce Construction Co. entered a plea of guilty to the antitrust charge, and likewise, in 82-20011-01, the construction company entered a plea of guilty there to the one charge, which is an antitrust charge.

Now, as to Mr. Broce, 81-20119-01, he entered a plea of guilty to Counts 1 and 2, Count 1 being the antitrust charge and Count 2 being the mail fraud charge, and then in the later case, 82-20011-01, Mr. Broce entered a plea of guilty to the one count which was an antitrust charge.

A pre-sentence investigation was ordered, the same has been made as to each of the defendants.

Counsel, have you and the defendant had an opportunity to go over the pre-sentence reports as to both defendants in these cases?

MR. TILTON: I have. Did you have a chance to go over the pre-sentence report, Mr. Broce? I don't [4] think, Judge, he had a chance to actually sit down and read it, but he had the opportunity when he was here, but he had to leave because his plane was going to take off. I have discussed with him the contents of it.

THE COURT: Well, he has a right to read it if he wants to.

MR. TILTON: Do you want to read the pre-sentence report? You remember, I told you about what was in it.

DEFENDANT BROCE: Yes.

MR. TILTON: Do you want to read it, or do you want to waive that reading?

DEFENDANT BROCE: I guess I'll waive it.

THE COURT: Do you have any comments that you want to make on the pre-sentence reports or anything to say for and on behalf of the defendants?

MR. TILTON: Your Honor, the only thing that I have to say on behalf of the corporation, we would request that any fine that is payable, that the defendant corporation be allowed to make that in three installments. The government is not objecting to that and, of course, I understand that is up to the Court. It is our hope that this corporation can continue in business. They employ two hundred employees in the summer and they have many employees that have been with them [5] as many as forty years, and hopefully, the corporation will be allowed to continue in business so that these people do not lose their jobs.

We have entered into an agreement to cooperate with the government, and I think they will agree that we have been cooperating with them in their case in Oklahoma. We



have given them information that's been useful to them there, information they didn't have.

As to the defendant Ray Broce, the Court, of course, is aware that he is nearly 80 years old and he has no prior record. The Court has received many letters from people in the community asking the Court to consider his reputation and the things that he has done in that community. We feel that this is a serious matter, of course, and we would hope that the Court would consider his age and his past good works that he has done in his community. We would request any sentence that he might receive, that he be allowed to serve it at a minimum security institution, hopefully in Big Springs, Texas. He does have bad health. He has a circulation problem that strikes him about twelve times a year, makes him bedfast, and we hope that the Court will consider his age, his health, and the effect that a sentence will have on a man this age.

We would request that if the Court deems [6] a sentence appropriate that the defendant have two weeks to get his affairs in order.

I think Your Honor does have information in the file that although what this corporation has done is certainly wrong, in their road building they have striven to a degree of excellence. They are the only company in the United States that's been awarded the award for having the best built asphalt roads in the country. They won this award three consecutive years and their subsidiary in Oklahoma has done that, and certainly what they have done is wrong, but it shows they have attempted to provide to the government a better than ordinary road when they did build one, and Mr. Broce is very proud of that. He is very proud of his employees and hopes that whatever happens that he can continue to provide them employment.

THE COURT: Do you have any dispute with what the government has included in the pre-sentence report about

the official version of the offense, and particularly—I think it's the culpability and the cooperation under that phase of the statement of the offense.

MR. TILTON: Well, my client, Judge, certainly doesn't agree about the big five and those type of statements. Most of these defendants in this case have been in business a lot less longer than him.[7] If he had been trying to keep them out of business, they wouldn't—probably wouldn't have been in business. He certainly doesn't agree to that. There is a statement in there by Mr. Smith that Mr. Broce absolutely says is not true, he knew nothing about. That is our position on those things. No question he had been in the business longer than anybody probably in the state. He is one of the first people to build roads.

THE COURT: Do you have anything further?

MR. TILTON: That is all I have, Your Honor.

THE COURT: Mr. Broce, do you have anything that you wish to say on your own behalf?

DEFENDANT BROCE: Really, I don't know what it is. I have done the best I know how up to now.

THE COURT: Does the government wish to address the Court in regard to punishment?

MR. BRAUN: Very briefly, Your Honor.

With respect to just one issue there is something I would like to say. There is a suggestion in some of the letters which have been included in the pre-sentence report Mr. Broce and his company are a victim of circumstances. I think with respect to some of the smaller contractors that may very well be true. I think in the case of Mr. Broce and Broce Construction Company,[8] Mr. Broce played a very large part in creating the circumstances with which smaller contractors were faced. With respect to Mr. Broce, the Court has his net worth available and can see that Mr. Broce didn't need to engage in these types of activities either to feed his family or to adequately care for his company or his employees.



I have nothing further.

THE COURT: Mr. Tilton, do you have anything further to say?

MR. TILTON: No, Your Honor, I don't. I realize that Mr. Broce does have a substantial net worth, but I can tell you that most of this money was not made in the road building business. He has made some very shrewd investments. I think a majority of his net worth is derived from wholly owned subsidiary companies.

THE COURT: Is there any legal reason, then, why sentence should not be pronounced in both of these cases?

MR. TILTON: None known to the defendant, Your Honor.

THE COURT: The Court has reviewed the extensive pre-sentence reports in both of these cases. This one here, for example, are all letters that have been written on your behalf, Mr. Broce, by people—[9] friends and colleagues of yours and, of course, you rightfully can be very proud of those.

The Court has noted from this report the fact that apparently this is a self-made man who through hard work and perseverance and the insistence upon quality work being done has risen to really the top of the industry in the state, and along with that, apparently he has been a—loyal to his employees, a community leader, generous in his work, and also the providing of financial help to individuals and community projects.

Specifically, as to the offenses in question, here, though, it would appear that this defendant and this company have played a significant role in making bid rigging a way of life in the highway construction business in this state. In fact, it would appear from looking at many of these other bid rigging cases in connection with this one, that while many of the small contractors have been more

or less fighting or scraping for the crumbs that some of the big ones, including the defendant, have been more or less busy cutting up the big load, and according to the government, these activities by this company have been extensive, so it is against this type of conduct that in the Court's opinion the antitrust laws are especially directed.

[10] In determining the appropriate punishment in this case, the Court has considered and is taking into consideration all of the letters that have been sent by friends and acquaintances and business associates of Mr. Broce. The Court is also taking into account the fact that he has entered pleas of guilty and has saved the government the expense of trial, and, of course, the Court is also taking into consideration his age and health.

Even with these mitigating factors, which are being fully considered, the Court is of the opinion that justice requires a sentence of incarceration.

As to each of the cases, so far as the corporation is concerned, in the first case, 81-20119-01, the corporation is fined the sum of $750,000.

In case 82-20011-02, the corporation is fined the sum of $750,000.

The total fines, then are $1,500,000, and the same are to be paid as follows: One-third by December 31, 1982, one-third by December 31, 1983, one-third by December 31, 1984.

As to Mr. Broce personally, in 81-20119-02, the antitrust charge, the defendant is fined the sum of $50,000. It is also the judgment, order and sentence of the Court that the defendant be committed to the [11] custody of the Attorney General or his authorized representative for imprisonment for a period of two years, and he shall become eligible for parole at such time as the Parole Commission shall determine under 4205(b)(2) of Title 18 of the United States Code.



On the mail fraud charge, he is fined the sum of $1,000, and a similar two-year sentence is imposed and that is to be concurrent. The sentences of imprisonment are to be concurrent.

In 82-20011-02, the defendant is fined the sum of $50,000, and he is also sentenced to a similar term of imprisonment. All sentences of imprisonment are to run concurrently.

The total fine against Mr. Broce personally is $101,000. The fines must be paid prior to the defendant's release from incarceration. In other words, they are committed fines.

The Court recommends that this sentence be served at a minimum security institution and you have requested Big Springs. It is my understanding that they cannot take him because of overcrowding, and if that be true, the Court would recommend the federal institution at Fort Worth, Texas, which is a minimum security institution, but we will leave it that it will be first Big Springs. If they cannot take him, then it would be[12] Fort Worth.

The Court will permit voluntary surrender and a stay of execution two weeks from today and he would surrender during business hours.

I think you have one count to dismiss in this case.

MR. BRAUN: At this time, Your Honor, the government would move to dismiss the mail fraud count which remains in 20119 against the defendant Broce Construction Company.

THE COURT: That count, then, is dismissed.

Mr. Tilton, now, before Mr. Broce leaves today, he will have to sign some papers for this direct surrender, so be sure and do not get away until you do that.

MR. TILTON: All right, Your Honor.

THE COURT: Now, Mr. Gumm.

This defendant was before the Court on the same day, would be February 8, 1982, entered a plea of guilty to Counts 1 and 2 of the indictment, and that is in 81-20119-01.

A pre-sentence investigation has been made as to Mr. Gumm, and counsel and the defendant, have you had an opportunity to go over the pre-sentence report in this case?

[13] DEFENDANT GUMM: Yes, yes, sir.

THE COURT: Mr. Tilton, do you have any comments to make on the report or anything to say for and on behalf of the defendant?

MR. TILTON: Your Honor, I would hope that the Court would consider this man's good record up until this time. It is in the pre-sentence report, of course, but he has served his country. He has been honorably discharged. You have many letters from people in his community asking the Court for consideration. He is the manager of this business with two hundred employees. It would be hoped that any sentence he might receive that he be allowed to serve that after Mr. Broce has served his sentence so this business could continue and these people would not be without work. The goverment I know in their pre-sentence report has felt that he has not cooperated, but he did eventually plead guilty and he has tried to cooperate to the best of his ability. He has suffered from a loss to his reputation. He has a wife and three children, one child still at home. He is active in his church and he probably has had a misguided loyalty to his employer, but he has benefited little from all of these activities, and we hope that the Court will consider these facts in passing sentence.

[14] THE COURT: Mr. Gumm, do you have anything that you would like to say in your own behalf or anything to present to the Court in the way of mitigation of punishment?



DEFENDANT GUMM: No, sir. I have an attorney to do that.

THE COURT: Does the government wish to address the Court in regard to punishment?

MR. BRAUN: I do, Your Honor.

THE COURT: All right.

MR. BRAUN: Two things I would like to bring to the Court's attention with respect to this defendant. First, early in the investigtion, we contacted Mr. Tilton and Mr. Tilton contacted us and we made a very specific offer to Mr. Gumm in the way of a plea agreement to obtain his cooperation. That offer the defendant at that time turned down, and there was some indication on his part that he did not have an interest in cooperating in the investigation.

The second fact I would like to bring to the Court's attention is a statement in the pre-sentence report, the defendant's version that this defendant did not realize that what he was doing in the way of setting up jobs, obtaining complementary bids, was wrong. The record shows that Mr. Gumm signed affidavits of [15] non-collusion as part of bidding proposals which he submitted. He worked for the Highway Department and knew what kind of competition the state of Kansas was looking for, and I note that he was the valedictorian of his high school class. It seems to me to be difficult to conceive of a person with that type of experience not believing that what he did was wrong, not knowing that what he did as he read those affidavits of non-collusion and signed them with the statement that a signature on a false one was a separate violation of law, not realizing that what he was doing violated the law. Those two matters I would bring to the Court's attention. Thank you.

THE COURT: Mr. Tilton, do you have any response?

MR. TILTON: Your Honor, if this defendant thought he had done anything wrong, he certainly understands

that he has. He has entered a plea of guilty and I realize that complementary bidding was long practiced, many years, in this state, and I think some of these people didn't really realize the seriousness and the ramifications of what it was. I'm not going to stand here and tell the Court he didn't know what he was doing was wrong. I'm sure he did, but he's here today, he knows he has been wrong, he has pled guilty, he has [16] tried to cooperate with the government, and I don't think the Court will ever see him here again.

THE COURT: Mr. Tilton, is there any legal reason, then, why sentence should not now be imposed?

MR. TILTON: None known to the defendant, Your Honor.

THE COURT: Well, the Court, of course, has gone over the numerous letters that have been received in this case as to this defendant. So far as culpability is concerned, of course, everything indicates that you were the person who really carried out the details of the collusive bidding practices of Broce Construction Company.

On Count 1, it is the judgment, order and sentence of the Court that, first, the defendant be fined the sum of $10,000, and he be committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of one year and one day.

On Count 2, no fine is imposed, the same sentence, one year and one day, is imposed, and these sentences are ordered to run concurrently.

The fine shall be paid before release from any incarceration, so it is a committed fine.

The Court recommends that this sentence be [17] served at a minimum security institution. The defendant will be permitted to voluntarily surrender to the institution designated, and in accordance with the plea agreement, the Court will grant a stay until the defendant Mr. Broce



is release from incarceration, and then within ten days the defendant then is to stand committed.

Is there any dismissal in this—there isn't in this case?

MR. BRAUN: No, there is not.

MR. TILTON: Your Honor, will the defendant be allowed to go to Big Springs if it's available at that time?

THE COURT: Well, I think we better just wait until that time rolls around because it is our understanding that Big Springs and Maxwell are both overcrowded to where they cannot take any more for a while, so we will just wait.

MR. TILTON: Your Honor, would it be possible to get copies of these letters that people wrote to these defendants so they could thank them?

THE COURT: We will give you the addresses, but I tell you, there are some letters in here that I am not sure the people would want you to have. I think that works both ways.

[18] MR. TILTON: Okay.

THE COURT: We will give you the addresses if you want them.

MR. TILTON: Thank you.

---

**REPORTER'S CERTIFICATE**

I hereby certify that the above 18 pages are a true and correct transcript of the proceedings in the above-entitled cause on the date as indicated.

/s/ HAROLD PITTELL

Harold Pittell
Office Reporter
United States District Court
District of Kansas

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

---

No. 81-20119-01-02

UNITED STATES OF AMERICA, PLAINTIFF

*-vs-*

BROCE CONSTRUCTION CO., INC., ET AL., DEFENDANTS

---

No. 82-20011-01-02

UNITED STATES OF AMERICA, PLAINTIFF

*-vs-*

BROCE CONSTRUCTION CO., INC., ET AL., DEFENDANTS

---

**AFFIDAVIT**

Kenneth F. Crockett, of lawful age, being first duly sworn and upon his oath deposes and states:

1. That he is a regularly practicing attorney in the State of Kansas and is admitted to practice before this Court.

2. That he and Robert Tilton represented defendants Broce Construction Co., Inc. and Ray C. Broce in the above-captioned cases including the plea hearing on February 8, 1982, and the sentencing hearing on March 15, 1982.

3. That originally, defendants were charged in Case No. 81-20119 with one count of conspiracy to violate 15 U.S.C. § 1 and one count of mail fraud.

4. It first came to my attention that the government was considering presentment of an additional indictment against defendants by a letter dated January 11, 1982,



from Richard J. Braun, a true and correct copy of which is attached hereto and made a part hereof by reference.

5. On January 18, 1982, Robert Tilton and I had a meeting in Topeka with Richard J. Braun and Robert Allen, attorneys for the government. The purpose of the meeting was to discuss plea negotiations. We were advised by Braun that if defendants plead, they would have to plead to two indictments each charging a conspiracy to violate 15 U.S.C. § 1 or they would go to trial on the first indictment (Case No. 81-20119) and then face one trial after the other on separate indictments for each highway project which the government believed were rigged and for which the government could obtain indictments. Defendants were given no other choice.

6. On January 27, 1982, the plea agreement was orally finalized. The Barton County project, Project No. KRL29-2(26) was substituted for the Ford County project referred to in Braun's January 11, 1982, letter.

7. Defendants were indicted in Case No. 82-20011 on February 4, 1982, but did not receive a copy of the indictment until just before the plea hearing on February 8, 1982.

8. At no time were there any discussions with defendants or the government concerning double jeopardy issues resulting from the second indictment. The question of double jeopardy was not considered by defendants prior to the pleas entered on February 8, 1982.

9. Further affiant saith naught.

/s/ KENNETH F. CROCKETT
Kenneth F. Crockett

Subscribed and sworn to before me this 22nd day of March, 1983.

/s/ PATRICIA GARDNER
Notary Public

My Commission Expires:

7-31-84



**U.S. Department of Justice**
Antitrust Division
*Midwest Office*

*219 South Dearborn Street* *312/353-7530*
*Chicago, Illnois 60604*

60-206-143 JAN 11, 1981

Kenneth F. Crockett, Esq.
Tilton, Dillon, Beck & Crockett
1324 Topeka Blvd.
Topeka, Kansas 66612

*Re: United States v. Broce Construction Co., et al.*

Dear Mr. Crockett:

Enclosed are proposed trial exhibits 21 and 22 being the registration cards for Ronald Siebert and Donald Popejoy for the April 25, 1978 letting. We also wish to advise you that we may call as witnesses three additional persons:

(1) Thomas Callagan
Gilbert Western Corp.
Salt Lake City, Utah

(2) David Adams
Adams Ranch
Forgan, Oklahoma

(3) Orville Spray, Jr.
Venture Corp.
Great Bend, Kansas

You are also advised that we may offer as a subsequent similar act testimony related to Ford County project 50-29 TQF 050-2(23) let by the State of Kansas on July 17, 1980. You should also be advised that we intend to present to the grand jury a proposed indictment concerning the above project naming each of the defendants as proposed defendants in that Indictment.

Within the next week we will send you a copy of a proposed Stipulation with respect to the issues of corporate status, bidding responsibilities, officers of the corporation and interstate commerce.

We would appreciate having your witness list by January 15, 1982.

Sincerely

/s/ RICHARD J. BRAUN
Richard J. Braun
Attorney, Midwest Office
Antitrust Division

Enclosure



# Supreme Court of the United States

No. 87-1190

UNITED STATES, PETITIONERS

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

ORDER ALLOWING CERTIORARI. Filed February 29, 1988.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60808

(8)

No. 87-1190

Supreme Court, U.S.
FILED
MAY 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

CHARLES FRIED
*Solicitor General*

CHARLES F. RULE
*Assistant Attorney General*

LOUIS R. COHEN
*Deputy Solicitor General*

KENNETH G. STARLING
*Deputy Assistant Attorney General*

ROY T. ENGLERT, JR.
*Assistant to the Solicitor General*

JOHN J. POWERS, III
JOHN P. FONTE
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

39 pp

## QUESTION PRESENTED

Whether a defendant who pleads guilty to two indictments alleging two different criminal conspiracies, as part of a plea bargain in which the government agrees not to prosecute him on other charges, is entitled to a factual determination of his contention, raised for the first time in a later collateral attack on his sentences, that the two conspiracies alleged were actually a single conspiracy.

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# In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1190

UNITED STATES OF AMERICA, PETITIONER

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The order and judgment of the court of appeals affirming the district court's grant of relief to respondents (Pet. App. 1a-4a) is unreported. The memorandum and order of the district court granting respondents relief (Pet. App. 5a-13a) is unreported. The prior opinion of the en banc court of appeals reversing the district court's denial of relief (Pet. App. 14a-86a) is reported at 781 F.2d 792. The prior opinion of the court of appeals panel (Pet. App. 87a-111a), which was vacated on the grant of rehearing en banc, is reported at 753 F.2d 811. The original memorandum and order of the district court denying respondents relief (Pet. App. 112a-123a) is unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-4a) was entered on August 18, 1987. A petition for rehearing and suggestion for rehearing en banc was denied on November 13, 1987 (Pet. App. 124a-125a). The petition for a writ of certiorari was filed on January 12, 1988, and was granted on February 29, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

## STATEMENT

Respondent Ray C. Broce is the president of respondent Broce Construction Co., Inc. Both respondents were named as defendants in two separate indictments filed in the United States District Court for the District of Kansas. Each indictment charged, among other things, conspiracy to rig bids on a specific Kansas highway construction project in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pursuant to plea bargains, both respondents entered guilty pleas to the Sherman Act counts of both indictments, and Mr. Broce also pleaded guilty to one count of mail fraud in violation of 18 U.S.C. 1341. The district court accepted the guilty pleas. Consistent with the plea bargains, the court imposed a total fine of $1.5 million ($750,000 on each Sherman Act count) on the corporation and sentenced Mr. Broce to concurrent two-year terms of imprisonment and a total fine of $101,000. Respondents subsequently filed a motion to vacate the sentences imposed on the charges in the second indictment. They based their request for relief on the ground that the sentences imposed on those charges constituted multiple punishment for the same offense in violation of the Double Jeopardy Clause. The district court initially denied the motion, but the court of appeals reversed and remanded for a factual determination. On remand, the district court granted the motion. The court of appeals affirmed.

1. In a two-count indictment filed on November 17, 1981 (Pet. App. 143a-151a), respondents were charged with one count of violating Section 1 of the Sherman Act and one count of mail fraud in violation of 18 U.S.C. 1341. The indictment alleged that the object of the Sherman Act conspiracy was to rig bids on Kansas Federal-Aid Highway Project No. 23-60-RS-1080(9) (the Meade County project), let by the State of Kansas on April 25, 1978. The indictment charged that the conspiracy began in or about April 1978. Pet. App. 147a.



Respondents were at all times represented by retained counsel. Plea negotiations began after the government sent a letter to respondents' counsel on January 11, 1982,[1] advising him that the government would seek an additional indictment against respondents for conspiracy to rig bids on a Ford County project let by the State of Kansas on July 17, 1979 (J.A. 75-76). Plea negotiations proceeded, and on January 22, 1982, the government sent respondents' counsel a letter enclosing draft plea agreements, which were eventually signed and were filed with the district court on February 8, 1982 (Pet. App. 126a-132a, 133a-135a).

In those agreements, both respondents agreed to plead guilty to the indictment charging them with conspiracy to rig bids on the Meade County project, and Mr. Broce agreed to plead guilty to the mail fraud charge. Respondents also agreed to plead guilty to a second indictment, which had not yet been filed, charging them with conspiracy to rig bids on a Barton County project let by the State of Kansas on July 17, 1979.[2] Respondents acknowledged in their plea agreements that the maximum fine for each Sherman Act count to which each of them was agreeing to plead guilty was $100,000 for Mr. Broce (Pet. App. 127a) and $1,000,000 for the corporation (*id.* at 134a). See 15 U.S.C. 1. Mr. Broce also acknowledged that consecutive sentences could be

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[1] The date stamp actually gave the year incorrectly as 1981.

[2] Respondents were never indicted for rigging bids on the Ford County project referred to in the government's letter of January 11, 1982.

imposed (Pet. App. 127a). In return for the guilty pleas, the government agreed, among other things, (1) not to prosecute respondents for other antitrust violations in Kansas and Oklahoma;[3] (2) to dismiss the mail fraud count against the corporation in the November 17 indictment; and (3) to recommend a total fine of $1.5 million against the corporation on the Sherman Act charges (Pet. App. 127a-128a, 134a-135a).

On February 4, 1982, as had been contemplated in the plea agreements, respondents were charged in a separate one-count indictment (Pet. App. 136a-142a) with Sherman Act conspiracy. The indictment alleged that the object of the conspiracy was to rig bids on the Barton County project, Kansas Public Highway Project No. KRL 29-2(26). The indictment charged that the conspiracy began in or about July 1979. *Id.* at 139a.

On February 8, 1982, respondents entered guilty pleas to the two Sherman Act conspiracy charges in accordance with the previously negotiated plea agreements. At the hearing conducted pursuant to Fed. R. Crim. P. 11, the district court ascertained that respondents understood that they "would be admitting all the facts alleged in these charges" (J.A. 35). The district court also explained that, "so far as the corporation is concerned, the maximum punishment is a fine up to one million dollars on each [Sherman Act] charge" and that, "as to you [Mr. Broce] individually, * * * the maximum punishment is a fine up to one hundred thousand dollars and a term of imprisonment up to three years on each [Sherman Act] charge" (J.A. 36). Mr. Broce indicated

[3] Respondents had in fact engaged in substantial violations of the Sherman Act in Oklahoma, some of which are described in detail (drawing on Mr. Broce's immunized testimony at two trials of Oklahoma co-conspirators following his guilty plea in this case) in *United States v. Washita Constr. Co.*, 789 F.2d 809 (10th Cir. 1986), and *United States v. Metropolitan Enterprises, Inc.*, 728 F.2d 444 (10th Cir. 1984).



without qualification that he understood (*ibid.*). The court questioned Mr. Broce, under oath, as to whether the government's written statement of facts in support of the pleas (Pet. App. 129a-132a) was correct. In response, Mr. Broce stated that he intended to let each bid-rigging agreement "stand on its own" and thus refused to discuss a future job in Grey County at the time the Meade County job was rigged (J.A. 40-41). He also stated, with one other qualification not relevant here, that the government's statement of facts was correct (J.A. 41-42). Defense counsel stated that he saw no reason "why the Court should not accept these pleas of guilty" (J.A. 43). The court did accept the pleas.

Before sentencing, the government prepared and provided to defense counsel an "Official Version of the Offense" for inclusion in the presentence report (J.A. 50-59). That document discussed a large conspiracy in Kansas in which respondents and others had participated before 1973 but stated that, "in about 1973, this conspiracy ended" (J.A. 50). It also stated that there were "two *separate* conspiracies giving rise to the indictments" (J.A. 51 (emphasis added)).[4]

Sentencing occurred on March 15, 1982. Defense counsel was given an opportunity to state "any dispute with what the government has included in the pre-sentence report about the official version of the offense" (J.A. 63-64). Defense counsel expressed some disagreements with the Official Version but did not dispute the explicit statements in the Official Version that the large, continuing conspiracy ended in 1973 and that there were two separate conspiracies giving rise to the two indictments (J.A. 64).[5] The court

[4] Through a proofreading oversight on our part, the word "Indictments" is incorrectly printed in the joint appendix as "Indictment." The word is plural in the original document.

[5] Among other things, the Official Version of the Offense described how the Meade County and Barton County projects were rigged. The Meade County project was one of several projects let by the State of

asked whether there was "any legal reason * * * why sentence should not be pronounced," and defense counsel responded: "None known to the defendant, Your Honor" (J.A. 65). The court then imposed on the corporation the fines that the government had agreed to recommend. The court also sentenced Mr. Broce to two years' imprisonment and to fines of $50,000 on each Sherman Act count and $1000 on the mail fraud count. J.A. 66-67.[6] On the government's motion, the court thereafter dismissed the mail fraud count against the corporation (J.A. 67).

Respondents did not appeal. Nor did they, at any time before sentencing, claim that the two indictments in fact alleged the same conspiracy.

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Kansas on April 25, 1978. During a series of meetings and discussions the night before that letting, many projects that were to be let were allocated among several road construction companies. For example, both respondents and Carlile Asphalt Company, Inc., were interested in the Meade County project. Initially, they were unable to agree which company would be allocated that project (J.A. 52). During the negotiations, Carlile offered to let respondents win the Grey County project that was to be let in May, in exchange for the Meade County project. Respondents, however, rejected this proposal because Mr. Broce preferred to let each bid-rigging agreement "stand on its own" (J.A. 41). Ultimately, Carlile agreed that respondents could be the low bidder on the Meade County project and that Carlile would be the low bidder for a Seward County project that was also let on April 25 (J.A. 52-53). The bids on the Barton County project, let on July 17, 1979, were rigged the night before the letting (J.A. 54-55). Both respondents and the Venture Corporation initially were interested in being the low bidder for the project (J.A. 54). Ultimately, however, the project was allocated to respondents. In exchange, respondents agreed to pay $75,000 to the Venture Corporation (J.A. 55). All of these facts, admitted by respondents at the time of their sentencing, lent substantial support to the allegations of the indictments that separate conspiratorial agreements were formed in April 1978 and in July 1979.

[6] Mr. Broce has paid his $101,000 fine and served his prison term. The corporation has paid $750,000 of the $1,500,000 in total fines assessed on the two Sherman Act counts.



2. On February 22, 1983, more than a year after the entry of their guilty pleas, respondents filed a motion pursuant to Fed. R. Crim. P. 35(a) to vacate their sentences on the charges contained in the second indictment. Relying on the intervening decision in *United States* v. *Beachner Constr. Co.*, 555 F. Supp. 1273 (D. Kan. 1983), aff'd, 729 F.2d 1278 (10th Cir. 1984), respondents argued that there had been only a single conspiracy to rig bids in Kansas.[7] Respondents therefore contended that they were guilty of only one Sherman Act offense and that it violated the Double Jeopardy Clause to impose fines for both Sherman Act counts to which they had pleaded guilty.

The government argued that respondents' failure to raise their double jeopardy defense at any time before judgment and sentence precluded them from doing so on collateral attack. The government also contended that the two indictments on their faces charged separate conspiracies, and argued that respondents could not attack the factual foundations of the indictments to which they had pleaded guilty. The government stipulated, however, that if the court reached the merits of the one-conspiracy-or-two issue it could " 'consider the record made in the evidentiary

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[7] The defendants in *Beachner* alleged that the large conspiracy discussed in the Official Version of the Offense in the present case—*i.e.*, a large, continuing conspiracy to rig bids on any and all Kansas highway jobs—did not (as the government contended) end in 1973, when the major organizer of the conspiracy went out of business. The defendants there argued that the post-1973 bid-rigging agreements with which they were charged were merely part of the same large, continuing conspiracy. The district court agreed with the defendants and rejected the government's argument that, after 1973, each new bid-letting gave rise to an opportunity to form a new conspiratorial agreement. The government appealed, but the court of appeals held that the question was one of fact and that the district court's finding was not clearly erroneous.

hearing' " that was held in the *Beachner* case (Pet. App. 63a).[8]

Relying on *Kerrigan* v. *United States*, 644 F.2d 47 (1st Cir. 1981), the district court held that a defendant asserting a double jeopardy claim may not contest the factual foundations of the indictment to which he entered a guilty plea. The court concluded that respondents had no right to obtain a factual determination whether two conspiracies or only one existed. The court noted that each indictment, on its face, charged a separate conspiracy. The court held that respondents had admitted their participation in separate conspiracies and therefore could not raise a double jeopardy claim that depended on the existence of only a single conspiracy. Pet. App. 112a-123a.

3. A divided panel of the court of appeals reversed (Pet. App. 87a-111a). The court granted rehearing en banc, but the en banc court also reversed by a divided vote (Pet. App. 14a-86a). Relying on *Menna* v. *New York*, 433 U.S. 61 (1975), and *Blackledge* v. *Perry*, 417 U.S. 21 (1974), the

[8] The stipulation, which is quoted in full in Judge Barrett's dissent from the decision of the en banc court of appeals in this case (Pet. App. 63a), provides in its entirety:

> Come now the parties and stipulate that the Court may consider the record made in the evidentiary hearing on the Motion to Dismiss filed by Beachner Construction Co., Inc. in *United States v. Beachner Construction Co., Inc., et al.*, Case No. 82-20076-01 in the United States District Court for the District of Kansas in ruling on the merits of defendants' Motion to Vacate Sentence Pursuant to Rule 35(a) in the instant case.

Both before and after this stipulation was filed, the government consistently argued in the district court that respondents had forfeited any double jeopardy defense they could have asserted before their guilty pleas and that, in any event, respondents were bound by the facts they had admitted at the time the guilty pleas were taken and thus were not entitled to a new factual determination concerning the number of bid-rigging conspiracies in Kansas. See U.S. Reply Memo. 2-4.



majority held that the Double Jeopardy Clause "stands as an inhibition upon the government's right to institute charges" that is "absolute" and not "subject to waiver" (Pet. App. 18a). The majority added that "the defendants' plea bargain cannot work an estoppel of their right to assert the invalidity of the charge" (*id.* at 20a). The majority rejected the government's argument that "the defendants' pleas of guilty must be considered admissions of all the facts alleged in the indictments," asserting that the indictments "did not specifically allege separate conspiracies" and reasoning that "the admissions of factual guilt subsumed in the pleas of guilty go only to the acts constituting the conspiracy and not to whether one or more conspiracies existed" (*id.* at 21a).

Having decided that the district court erred by holding respondents to their admissions that two conspiracies existed, the court of appeals next addressed the issue whether two conspiracies did in fact exist. Although the majority suggested that on their face the indictments did not charge more than one conspiracy, it ultimately concluded that "the question of whether the indictments charged one or two conspiracies is, in the context of this case, wholly factual" (Pet. App. 23a). Because the district court had not addressed that factual issue in its opinion, the court remanded the case "for a factual determination" (*id.* at 24a).

Judge McKay joined the majority opinion, including the order remanding to the district court, but he expressed reluctance to concur in the remand because he believed that as a matter of law the second indictment charged the same conspiracy as the first indictment (Pet. App. 25a). Judge Seymour agreed with the majority's holding that respondents could raise their double jeopardy claim on collateral attack, but not with its underlying reasoning that the Double Jeopardy Clause is "an 'absolute inhibition' upon government" (*id.* at 28a). She also disagreed with the majority's decision to remand the case, arguing that "the *Beachner*

findings should * * * be accorded full preclusive effect in this proceeding" (*id.* at 39a).

Judges Barrett and Doyle filed separate dissenting opinions. Judge Barrett distinguished *Menna* and *Blackledge* on the ground that no factual hearing was required to resolve the double jeopardy and due process issues in those cases (Pet. App. 50a-51a). Judge Barrett argued "that an accused waives his claim of double jeopardy to a subsequent criminal charge if the crimes charged, on their faces, are separate and distinct and if the evidence necessary to establish guilt as to one charge differs from that necessary to establish guilt as to another" (*id.* at 51a (emphasis omitted)). Judge Barrett stated that each indictment, on its face, charged a separate conspiracy (*id.* at 56a, 64a). Similarly, Judge Doyle concluded that *Menna* and *Blackledge* are distinguishable and that the defendants have waived their double jeopardy argument in this case (Pet. App. 69a-86a).

4. On remand, the district court followed the approach taken in *Beachner* and found as a matter of fact that "the two indictments returned against these defendants charge simply different aspects of the same conspiracy to restrain competition" (Pet. App. 13a). The court therefore vacated the judgment and sentence entered on the second indictment (*ibid.*).

The government appealed, both renewing the argument that respondents were precluded from raising their double jeopardy claim in the circumstances of this case and arguing that the district court had committed reversible error in finding that there was only one conspiracy. While the appeal was pending, this Court decided *Ricketts* v. *Adamson*, No. 86-6 (June 22, 1987), holding that the defendant in that case had waived his double jeopardy rights through the terms of his plea agreement.

The court of appeals, once again divided, affirmed in a short opinion (Pet. App. 1a-4a). The court wrote (*id.* at 2a):



> Although *Ricketts* invalidates the broader rationale underlying the plurality [*sic*] opinion in *Broce*, that the double jeopardy prohibition "does not constitute an individual right which is subject to waiver," 781 F.2d 795, it does not affect its narrower holding, based on clear Supreme Court precedent, that a guilty plea does not itself constitute a waiver of double jeopardy protection. *Id.* at 796-97; *see also Menna v. New York*, 423 U.S. 61, 62-63 & n.2 (1975) (guilty plea is merely an admission of factual guilt, which does not bar a claim that the state may not constitutionally prosecute the defendant no matter how validly his factual guilt is established); *Blackledge v. Perry*, 417 U.S. 21, 29-31 (1974).

The court also rejected the government's argument that there were in fact two conspiracies (Pet. App. 2a-3a). Judge Barrett dissented (*id.* at 4a). Rehearing was denied, Judge Barrett again dissenting, and rehearing en banc was denied (*id.* at 124a-125a).

## SUMMARY OF ARGUMENT

The general rule is that a defendant who is convicted after a voluntary and intelligent plea of guilty may not thereafter collaterally attack his conviction. In particular, it does not suffice to show that, in retrospect, the defendant misapprehended the government's case against him, or that he would not have pleaded guilty if he had known what later cases would hold. In two exceptional instances, this Court has held that a defendant was not bound by his plea of guilty to a facially invalid charge. *Blackledge* v. *Perry*, 417 U.S. 21 (1974); *Menna* v. *New York*, 423 U.S. 61 (1975). The court of appeals here relied on those two cases, but they have no bearing on this case, in which the convictions were facially valid and resulted from negotiated plea agreements.

A. Respondents' double jeopardy claim is based on their contention that there was, in fact, only a single conspiracy to rig bids in Kansas. Their pleas of guilty to the indictments in this case, however, established that there were two conspiracies, and the pleas therefore validly removed any issue of double jeopardy from this case. The court of appeals erred in permitting respondents to litigate a factual issue that had been resolved by their pleas.

Each indictment on its face charged a separate conspiracy to rig bids. Respondents, advised by counsel, entered voluntary and intelligent pleas of guilty, whose legal effect was to admit all of the material facts of the formal criminal charges contained in the indictments. Moreover, at the time respondents entered their guilty pleas and were sentenced, they were given a specific opportunity to challenge the government's contention that there were separate conspiracies, and they affirmatively declined to do so.

Having pleaded guilty in 1982 to two separate conspiracies, respondents were not entitled to reopen the issue in subsequent collateral proceedings. Nothing in *Blackledge* or *Menna* allows a defendant to repudiate factual admissions implicit in an otherwise valid guilty plea so that he can assert a new defense. In neither case did the Court rely on facts contrary to those that the defendant had admitted in pleading guilty. Indeed, each case rested on the facial invalidity of the charge to which the defendant pleaded guilty, and neither case required any further factfinding whatever.

B. Unlike the defendants in *Blackledge* and *Menna,* respondents pleaded guilty pursuant to plea agreements. Those agreements gave respondents substantial benefits, including the government's promise not to prosecute them for other bid-rigging activity in either Kansas or Oklahoma. To secure that promise from the government, respondents agreed to plead guilty to two indictments charging separate



bid-rigging conspiracies. These agreements constitute valid and enforceable contracts that respondents—having permanently obtained the benefits of the government's promises—should not have been allowed to repudiate. A defendant's plea agreement that subjects him to what he only later claims is a second prosecution for the same offense is binding and enforceable, and the Double Jeopardy Clause does not of its own force relieve the defendant from his voluntary choice to enter into that agreement. *Ricketts* v. *Adamson, supra.*

Here respondents made a deliberate and counseled decision to subject themselves to the maximum penalty on two conspiracy charges rather than risk the possibility of much greater liability for all of their bid-rigging activities in both Kansas and Oklahoma. Respondents had the opportunity to challenge the government's theory that each Kansas bid-letting gave rise to a separate conspiracy, but they elected not to do so. The government, by not pursuing other charges, detrimentally relied on respondents' choice not to raise the double jeopardy issue before pleading guilty, and that detrimental reliance is a sufficient basis to hold respondents to their pleas.

## ARGUMENT

### RESPONDENTS ARE NOT ENTITLED TO INVALIDATE CONVICTIONS, FOLLOWING GUILTY PLEAS PURSUANT TO PLEA AGREEMENTS, ON DOUBLE JEOPARDY GROUNDS

The basic rules governing attempts by defendants to overturn their own prior guilty pleas were established by this Court in a trilogy of cases decided in 1970 and a fourth case decided in 1973. *Brady* v. *United States,* 397 U.S. 742 (1970); *McMann* v. *Richardson,* 397 U.S. 759 (1970); *Parker* v. *North Carolina,* 397 U.S. 790 (1970); *Tollett* v. *Henderson,* 411 U.S. 258 (1973). In each case, the defendant had a

defense that might have been successful if he had litigated it rather than pleading guilty, but the Court refused to allow the guilty plea to be set aside on the basis of later factual or legal developments indicating that the defense might have succeeded.[9] The Court wrote (*Brady*, 397 U.S. at 755 (citations and quotation marks omitted)):

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation * * *, or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g., bribes).[10]

Elaborating on this stringent standard, the Court added in *Brady* that "[a] defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative

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[9] *Brady* involved a plea of guilty allegedly induced by the defendant's fear that he would receive the death penalty—under a statute whose death penalty provision was later held unconstitutional in *United States* v. *Jackson*, 390 U.S. 570 (1968)—if he went to trial. *McMann* involved pleas of guilty allegedy induced by the defendants' expectation that coerced confessions would—under a procedure later held unconstitutional in *Jackson* v. *Denno*, 378 U.S. 368 (1964)—be made known to the same jury that would decide the defendants' guilt or innocence. *Parker* involved a plea of guilty allegedly induced both by fear of the death penalty (under a statute alleged to be unconstitutional) and by fear of the use of an allegedly coerced confession. *Tollett* involved a claim, well grounded in fact but unknown to the defendant and his counsel at the time of the guilty plea in 1948, that black persons were systematically excluded from grand juries in Davidson County, Tennessee.

[10] The Court recently repeated this statement in *Mabry* v. *Johnson*, 467 U.S. 504, 509 (1984).



courses of action" (397 U.S. at 757). "[T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments" (*McMann*, 397 U.S. at 769), in part because "uncertainty is inherent in predicting court decisions" (*id.* at 771). Thus, "[w]aiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts" (*id.* at 770). "Although [the defendant] might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act" (*id.* at 774). Refusing (in light of the defendant's guilty plea) to entertain an apparently meritorious challenge to the composition of the grand jury, the Court added in *Tollett*, 411 U.S. at 267:

> A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry. And just as it is not sufficient for the criminal defendant seeking to set aside a plea to show that his counsel in retrospect may not have correctly appraised the constitutional significance of certain historical facts, * * * it is likewise not sufficient to show that if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings.

In *Blackledge* v. *Perry*, 417 U.S. 21 (1974), and *Menna* v. *New York*, 423 U.S. 61 (1975), the Court made clear that the *Brady/Tollett* rule does not mean that a guilty plea waives the right to assert the facial invalidity of the very

charge to which the defendant pleads. In *Blackledge*, the defendant was convicted of a misdemeanor but then invoked his state-law right to a trial de novo in a higher court. The prosecutor then secured a felony indictment covering the same conduct as the earlier trial and conviction. The defendant pleaded guilty to the felony charge, but this Court overturned the conviction, holding that the Due Process Clause forbade the prosecutor from obtaining a felony indictment in these circumstances. The Court rejected the State's "understandable" (*id.* at 30) argument that the defendant's guilty plea precluded his constitutional challenge to the bringing of the felony charge, stating that it was dealing with "the very power of the State to bring the defendant into court to answer the charge brought against him" (*ibid.*). The Court distinguished *Tollett* on the ground that "even a tainted indictment of the sort alleged in *Tollett* [*i.e.*, one returned by an unconstitutionally composed grand jury] could have been 'cured' through a new indictment by a properly selected grand jury" (417 U.S. at 30).

The next year, the Court summarily reversed a lower court decision finding a "waiver" of a double jeopardy claim by a guilty plea to a second charge based on conduct for which the defendant had previously been convicted and punished. *Menna* v. *New York*, *supra*. The defendant had been convicted of criminal contempt for failure to testify before a grand jury; after serving his contempt sentence, he was indicted for refusal to answer questions before the grand jury. A double jeopardy claim, later conceded to be "a strong one on the merits" (*id.* at 62 n.1), was rejected by the trial court, and the defendant then pleaded guilty. The conviction was affirmed on the basis of *Tollett*, but this Court reversed on the authority of *Blackledge* and remanded for a determination of the merits of the double jeopardy claim (423 U.S. at 62). In a footnote, the Court explained why it was *Blackledge* rather than *Tollett* that controlled the outcome: "The point of [the *Tollett* and *Brady* line of cases] is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case" (423 U.S. at 62 n.2). In the same footnote, the Court added, "We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the State may not constitutionally prosecute" (*id.* at 63 n.2).



It is the rule of *Tollett* and the *Brady* trilogy, not the exception recognized in *Blackledge* and *Menna*, that governs this case. First, the effect of the guilty pleas in this case was not any sort of "waiver" but the valid elimination of any double jeopardy issue from the case. Judged on their face, the indictments in this case presented charges that the government had the power to prosecute separately. Respondents' counseled pleas of guilty admitted the material facts set forth in the indictments. Respondents' double jeopardy claim is wholly dependent on factual assertions inconsistent with the facts set forth in the indictments, and the guilty pleas therefore "*quite validly* remove[d] the issue of [double jeopardy] from the case" (paraphrasing *Menna*, 423 U.S. at 62 n.2). A second and independent reason why this case is unlike *Blackledge* and *Menna* is that it involves more than mere guilty pleas: it involves a plea agreement supported by valid consideration. Respondents' agreement to plead guilty to two counts, in exchange for the government's promise not to bring other charges, was a valid and binding agreement that "removed the double jeopardy bar" (*Adamson*, slip op. 6). The government has detrimentally relied on respondents' promises, and allowing respondents now to repudiate those promises would prejudice the government in a way that the decisions in *Blackledge* and *Menna* did not.

### A. Respondents Were Not Entitled To Litigate Factual Questions After Pleading Guilty

The indictments in this case charged two different agreements (and therefore two different conspiracies), beginning on different dates, to rig bids on two different projects. There is no question of double jeopardy in this case unless those allegations were factually wrong. But respondents admitted the allegations by pleading guilty, and they had no right – constitutional or otherwise – later to litigate factual questions that were resolved by their pleas.

It is well established that an unconditional plea of guilty is an admission of all the elements and material facts of the criminal charge contained in the indictment. *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969); see also *Menna*, 423 U.S. at 62-63 n.2 (guilty plea admits "factual guilt"). As such, the guilty plea "is itself a conviction. Like a verdict of a jury it is conclusive." *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927); *Machibroda* v. *United States*, 368 U.S. 487, 493 (1962); see also *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); *Mabry* v. *Johnson*, 467 U.S. 504, 508 (1984). The plea substitutes a binding confession of the facts alleged in the indictment, and explained to the defendant, for a jury verdict finding that the same facts have been proved beyond a reasonable doubt. See *Henderson* v. *Morgan*, 426 U.S. 637, 647-648 (1976) (White, J., concurring). " 'A plea of guilty is more than a voluntary confession made in open court. *It also serves as a stipulation that no proof by the prosecution need be advanced.* . . . It supplies both evidence and verdict, ending controversy.' " *Boykin*, 395 U.S. at 242-243 n.4 (quoting *Woodard* v. *State*, 42 Ala. App. 552, 558, 171 So. 2d 462, 469 (1965)) (emphasis added). By entering pleas of guilty to both conspiracy charges in this case, respondents admitted the facts alleged in the indictments and stipulated that the government need not put on evidence to prove the factual proposition that there were two separate conspiracies.



Respondents knew that they were making factual admissions: the district court admonished them at the plea-taking hearing that by pleading guilty they would be admitting all of the facts alleged in the indictments. And, as we have already noted, respondents were given further opportunities to dispute the government's version of their offenses, including its explicit statement that there were two separate conspiracies, yet they did not take those opportunities. Indeed, Mr. Broce even volunteered under oath – in direct contradiction to the theory later adopted in *Beachner* – that he intended each bid-rigging agreement to "stand on its own" (J.A. 41).

The Double Jeopardy Clause does not entitle a defendant to mount a collateral attack on the factual determination, made by his own admission via a guilty plea, that he entered into two conspiratorial agreements rather than one. The double jeopardy issue is in this respect like the issue of factual guilt: a defendant has a constitutional right – a right of the very highest order – not to be punished unless he is guilty of crime, but his counseled plea of guilty "*quite validly* removes the issue of factual guilt from the case" (*Menna*, 423 U.S. at 62 n.2). For example, a defendant who pleads guilty to conspiracy, only to learn later that the government's case was so weak that his co-conspirator who went to trial was acquitted, is not entitled to have his conviction set aside: *his* factual guilt was determined with finality by the process he chose. So here, respondents now regret pleading guilty to the two conspiracies in light of the defendants' success in the *Beachner* case, but they "solemnly admitted" the relevant facts (*Tollett*, 411 U.S. at 267), and as to them any question of whether there was one conspiracy or two was resolved with finality by their pleas.

It is no objection that respondents' counsel could not foresee the outcome in *Beachner*. By choosing to plead guilty, respondents ran "the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts" (*McMann*, 397 U.S. at 770). "[J]ust as it is not sufficient for the criminal defendant seeking to set aside a plea to show that his counsel in retrospect may not have correctly appraised the constitutional significance of certain historical facts, * * * it is likewise not sufficient that he show that if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings" (*Tollett*, 411 U.S. at 267). Like the defendant who pleads guilty but later insists that he is "really" innocent, respondents have come to court too late to insist on the right to a trial of the question whether there was one conspiracy or two. That factual determination was made as to them when they pleaded guilty. *Boykin*, 395 U.S. at 242-243 n.4.

Neither *Blackledge* nor *Menna* involved reopening any factual issue resolved by the guilty plea. In *Blackledge*, the Court ruled, without any inquiry into the prosecutor's actual motivation (see 417 U.S. at 28) or any other disputed issue of fact, that due process did not permit the felony charge to be brought at all. The double jeopardy issue in *Menna* involved a question of state law that was left to the state courts to resolve on remand: whether, as a matter of New York law, the contempt conviction and the later refusal-to-answer conviction were "for the same crime" (423 U.S. at 62 n.1). Indeed, the Court carefully limited its holding to the situation in which "judged on its face * * * the charge is one which the State may not constitutionally prosecute" (*id.* at 63 n.2)—just the opposite of the situation in this case, in which the claimed constitutional



infirmity rests on factual allegations that contradict the indictments.

We submit that the First Circuit's opinion in *Kerrigan* v. *United States*, *supra*, on which the district court relied when it initially denied relief (Pet. App. 119a-122a), correctly stated the controlling principles to be derived from this Court's decisions. In *Kerrigan*, the defendant "was sentenced on the basis of guilty pleas to two indictments, both charging conspiracy to transport stolen goods in interstate commerce" (644 F.2d at 47). The guilty pleas were entered pursuant to a plea bargain in which the defendant agreed to plead guilty to both conspiracy charges and the government agreed to dismiss one other count and to make certain recommendations concerning sentence. His pleas were accepted, and he was sentenced to three years' imprisonment for one conspiracy and a consecutive two-year term for the other. *Id.* at 48. On collateral attack (see *id.* at 47), Kerrigan argued "that there was in fact only one conspiracy" (*id.* at 48). The First Circuit rejected Kerrigan's argument that *Menna* required an evaluation of his double jeopardy claim on its merits, observing that *Menna* does not hold "that a defendant who pleaded guilty may later contest the factual and theoretical foundations of the indictment to which he pleaded, so as to show that, in fact, he committed only a single offense" (*id.* at 49). And the court refused to consider Kerrigan's argument that there was in fact only one conspiracy, holding that "Kerrigan's claim of double jeopardy must be evaluated under the version of facts stated in the indictment, not against an alternative version of events which Kerrigan now claims is more accurate" (*ibid.*).

Like the indictments in *Kerrigan*, the indictments in this case plainly allege separate conspiracies. One indictment charges a conspiracy starting in April 1978 to rig bids on the Meade County project; the other charges a conspiracy starting in July 1979 to rig bids on the Barton County proj-

ect. If those allegations were true, there were two conspiracies: "[I]ndictments charging two or more agreements, even agreements to commit similar or related crimes, charge more than one conspiracy" (*Kerrigan*, 644 F.2d at 49). See *Kotteakos* v. *United States*, 328 U.S. 750, 769 (1946) (distinguishing "the common purpose of a single enterprise" from "the several, though similar, purposes of numerous separate adventures of like character").

The en banc court of appeals' statement that the second indictment "contained no specific charge that the conspiracy itself was separate from the conspiracy alleged in the first indictment" (Pet. App. 21a) is irrelevant. The scope of any conspiracy is the scope of the unlawful agreement. See *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975); *Braverman* v. *United States*, 317 U.S. 49, 52-53 (1942). To charge that there were two different agreements, therefore, is to charge that there were two separate conspiracies. There is no need for a distinct statement that an agreement beginning in July 1979 was a different agreement from one beginning in April 1978. Because each indictment in this case charged an agreement to rig bids on a particular project, respondents' guilty pleas admitted participation in separate conspiracies and precluded a later evidentiary hearing to determine whether there was in fact only one conspiracy. See *United States* v. *Allen*, 724 F.2d 1556, 1557-1558 (11th Cir. 1984) (refusing to consider claim that two counts in the indictment "constituted a single offense for which [defendant] could receive only a single sentence"); *United States* v. *Pratt*, 657 F.2d 218, 220-221 (8th Cir. 1981) (rejecting argument "that *Menna* * * * requires us to reach the merits of Pratt's double-jeopardy argument"); *Kerrigan*, 644 F.2d at 49 (observing that *Menna* does not hold "that a defendant who pleaded guilty may later contest the factual and theoretical foundations of the indictment to which he pleaded [guilty],



so as to show that, in fact, he committed only a single offense").[11]

In this case no showing sufficient to support a double jeopardy defense could have been made without *contradicting* the factual allegations of the indictments. We think it equally clear, however, that a defendant should not be allowed to attack a conviction based on a guilty plea when the attack depends on *supplementing* the record with factual findings. It is not the role of an indictment to negate all possible defenses (*United States* v. *Sisson*, 399 U.S. 267, 288 (1970)), and it will often be the case that the factual allegations in an indictment, although they do not show a violation of the Double Jeopardy Clause, are not sufficient to disprove the double jeopardy defense either. A defendant who does not plead guilty may then attempt to establish a valid double jeopardy defense, in pretrial proceedings or at trial, either by proving that the allegations of the indictment are untrue or by proving other facts that are neither alleged in nor contradicted by the indictment. But a defendant who chooses to plead guilty rather than make such a factual showing forgoes the procedure that the law provides and thus forfeits his right to make that showing.

The court of appeals' holding that respondents were entitled to an evidentiary hearing on factual issues resolved by their guilty pleas is unprecedented. Although some other

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[11] See also *United States* v. *Griffin*, 765 F.2d 677, 680-682 (7th Cir. 1985); *United States* v. *Solomon*, 726 F.2d 677, 678 n.2 (11th Cir. 1984); *United States* v. *Herzog*, 644 F.2d 713, 716 (8th Cir.), cert. denied, 451 U.S. 1018 (1981); *Brown* v. *Maryland*, 618 F.2d 1057, 1058-1059 (4th Cir.), cert. denied, 449 U.S. 878 (1980); cf. *United States* v. *Sheehy*, 541 F.2d 123, 130 & n.20 (1st Cir. 1976) (defendant may not raise multiplicity argument for the first time on appeal); *United States* v. *Perez*, 565 F.2d 127, 1232 (2d Cir. 1977) (double jeopardy argument waived if not asserted before trial); *United States* v. *Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984) (same), cert. denied, 472 U.S. 1017 (1985).

courts of appeals have allowed double jeopardy attacks on prior guilty pleas, no court of appeals has allowed the defendant to impeach factual determinations inherent in the making and acceptance of an otherwise valid guilty plea. In most cases in which a double jeopardy claim has been allowed, the courts have stressed that no factual issue was presented. See *Launius* v. *United States,* 575 F.2d 770, 771 (9th Cir. 1978) ("[i]t appeared on the face of the indictment that but one agreement was involved and hence but one conspiracy"); *United States* v. *Baugh,* 787 F.2d 1131, 1132 (7th Cir. 1986) ("This court need not transcend the four corners of the information in this case in order to assess the validity of Baugh's claim."); *United States* v. *Broussard,* 645 F.2d 504, 505 (5th Cir. 1981) (rejecting double jeopardy claim without requiring fact finding); see also *United States* v. *Blocker,* 802 F.2d 1102, 1104-1105 (9th Cir. 1986) (same). In only one case other than this one has a court allowed a double jeopardy defense based on fact finding, but even in that case the court was careful to note that it would not (as the court below did) allow a defendant to impeach the factual determinations made by the plea: "A petitioner who later contests his sentence on double jeopardy grounds after entering a guilty plea * * * has lost his right to challenge or dispute either the information in the indictment or any other facts he admitted when his guilty plea was taken." *United States* v. *Atkins,* 834 F.2d 426, 439 (5th Cir. 1987).[12]

[12] For the reasons stated at p. 23, *supra,* we believe that *Atkins* was wrongly decided. In *Atkins,* the allegations in the indictment did not establish a double jeopardy claim but neither did they demonstrate that no such claim could be valid. In those circumstances, the court found further factfinding appropriate. There is, however, no support in this Court's cases for such a procedure. To the contrary, a defendant who elects not to put the government to its proof at the time of his plea in effect stipulates that he will not call on the government to prove its case (see *Boykin,* 395 U.S. at 242-243 n.4). The guilty plea should foreclose later factual proceedings designed to supplement the allegations of the indictment as well as later factual proceedings designed to contradict the allegations of the indictment.



There is no justification for allowing a factual inquiry into whether two facially distinct crimes to which a defendant has pleaded guilty were in fact the same offense, and the court of appeals provided none except its erroneous reading of *Blackledge* and *Menna* as cases attaching talismanic significance to any and all invocations of the Double Jeopardy Clause. Indeed, the decision of the court of appeals, if affirmed, would simply encourage defendants to challenge their sentences long after their guilty pleas are entered. Any incarcerated defendant who as a result of a guilty plea has received consecutive sentences for two similar crimes, and any defendant who as a result of a guilty plea has been assessed cumulative fines for two similar crimes, would have the right to a factual determination whether those crimes are actually distinct. That would be true notwithstanding the defendant's failure to raise this factual issue at any time before pleading guilty, and it would be true no matter how much time has passed since conviction.[13] The double jeopardy claim would seldom prove meritorious, but it would rarely be possible to dispose of the claim without a hearing. As the requirement of a factual hearing is asserted to be of federal constitutional origin, this claim would be cognizable in habeas corpus actions brought by state prisoners as well as on collateral attack by convicted federal defendants. And, according to the court below, the defendant's right to obtain a factual determination of his double

[13] Cf. *United States* v. *Griffin,* 765 F.2d 677, 681-682 (7th Cir. 1985) (because "it would be to the defendant's tactical advantage to delay bringing * * * multiplicity claim until after trial" since government's evidence may be lost or become stale, defendant is required to assert multiplicity defense based on indictment before trial).

jeopardy claim includes the right to contradict facts he admitted in his plea-taking or sentencing hearing.

Nothing in *Blackledge* or *Menna* suggests any such result. Indeed, such a result is inconsistent with this Court's prior decisions concerning the effect of guilty pleas and the finality of convictions. See, *e.g.*, *Kercheval* v. *United States, supra*; *McCarthy* v. *United States, supra*; *Santobello* v. *New York*, 404 U.S. 257, 261 (1971) (plea bargaining "leads to prompt and largely final disposition of most criminal cases"); *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977) ("dispositions by guilty plea are accorded a great measure of finality"); *Mabry* v. *Johnson*, 467 U.S. at 508 (footnote omitted) ("It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked."). Respondents' claim of double jeopardy – unlike the constitutional claims presented in *Blackledge* and *Menna* – depends on factual assertions that are inconsistent with, or go beyond, the facts set forth in the indictments and admitted by their guilty pleas. The court of appeals erred in allowing respondents to repudiate those admissions, and its decision, therefore, should be reversed.

### B. Respondents Were Not Entitled To Repudiate Their Guilty Pleas After Inducing the Government To Rely on Those Pleas

There is a second and independent reason why respondents should not be permitted to make a collateral attack on their convictions here. Respondents entered into a plea agreement under which the United States agreed not to prosecute them on other charges in return for their pleas of guilty to two conspiracy charges. The plea agreement was a valid contract. Having entered into it and received its benefits, respondents should not have been allowed to repudiate their half of the bargain.



"[T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott*, 437 U.S. 82, 99 (1978).[14] Just last Term, this Court applied that principle to the case of a defendant who – like respondents – sought to invoke the Clause as a means to escape from the terms of his plea agreement. In *Ricketts* v. *Adamson, supra*, the Court held that the defendant could be convicted of first-degree murder even after his prior guilty plea to a lesser included offense, because he had agreed that if he failed to give certain promised testimony the original first-degree murder charge would be automatically reinstated (slip op. 7). *Adamson* thus holds that a defendant may validly agree to a bargain that includes the possibility of a sec-

[14] This statement from *Scott* encapsulates the underlying principle of numerous cases in which this Court has held that, when it is the defendant's own actions that lead to more than one prosecution for a single charge, the Double Jeopardy Clause does not forbid that result. See, *e.g.*, *United States* v. *Ball*, 163 U.S. 662, 671-672 (1896); *United States* v. *Tateo*, 377 U.S. 463, 465 (1964); *United States* v. *Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion); *United States* v. *Dinitz*, 424 U.S. 600, 608 (1976); *Lee* v. *United States*, 432 U.S. 23, 33 (1977); *Scott*, 437 U.S. at 93; *Sanabria* v. *United States*, 437 U.S. 54, 63 n.15 (1978). For example, multiple prosecutions growing out of the same offense are permissible when the second proceeding was prompted or made necessary by the defendant's voluntary actions. Thus, "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." *Jeffers* v. *United States*, 432 U.S. 137, 152 (1977) (plurality opinion) (footnote omitted). And the Court has held that a defendant's guilty plea to a lesser included offense does not bar trial on the greater offense charged along with it, if it was the defendant's effort that led to "separate disposition of counts in the same indictment." *Ohio* v. *Johnson*, 467 U.S. 493, 502 (1984). See also *Garrett* v. *United States*, 471 U.S. 773, 798 (1985) (O'Connor, J., concurring).

ond prosecution for the same offense. If he chooses to take actions that subject him to a second prosecution, the "Double Jeopardy Clause does not relieve him from the consequences of that choice" (slip op. 9).

This case is very similar in that respect to *Adamson*. In each case a defendant made an agreement that did not mention the Double Jeopardy Clause[15] but in which he obtained substantial benefits for his guilty plea. In *Adamson,* the defendant entered a plea of guilty and promised to testify on behalf of the State, in exchange for which he gained a substantial benefit – the substitution of the charge of second-degree murder in place of the first-degree murder charge and the prospect of the death penalty. Here, in exchange for their agreements to plead guilty to the Meade County bid-rigging indictment and the Barton County bid-rigging allegations, respondents got the benefits of no further prosecution for bid rigging in either Kansas or Oklahoma, a dismissal of the mail fraud count, and a recommendation (which the trial court accepted) of less than the maximum fine. Both in *Adamson* and in this case, the defendants were thoroughly counseled by an attorney in the plea-bargaining process. In both cases, the defendants knew very well the meaning of their pleas. Finally, in both cases the defendants breached their plea agreements. The cases differ in the relief sought by the prosecution. On the defendant's breach in *Adamson*, the prosecution relied on the terms of the agreement, which entitled the State, on the defendant's breach, to return to the status quo ante and prosecute the defendant for first-degree murder. In this case the prosecution seeks specific performance of the plea agreement to the extent of holding respondents to their pleas

[15] In *Adamson* this Court concluded that the fact "that 'double jeopardy' was not specifically waived by name in the plea agreement" was irrelevant (slip op. 7).



Like the defendant in *Adamson*, respondents in this case made a voluntary choice. Rather than risk prosecution on all of their bid-rigging activities in Kansas and Oklahoma, they agreed to plead guilty to specific charges in exchange for the government's agreement not to prosecute them further (and other government concessions). Now that respondents have received those benefits, they would like to "use the Double Jeopardy Clause as a sword" (*Ohio* v. *Johnson*, 467 U.S. at 502) and avoid their obligations under the plea agreement. But if the government may, as in *Adamson,* prosecute a defendant on the original charges following the defendant's breach of a plea agreement, then the government should also be permitted to hold the defendant to the plea agreement in the first place without regard to obstacles the Double Jeopardy Clause might impose in the absence of the plea agreement.

As in *Adamson,* the agreements into which respondents entered in this case were valid and enforceable bargains. The only basis on which respondents seek to escape from those bargains is the one the Court rejected in *Adamson*: that the multiple prosecutions (and, in this case, sentences) to which they have been subjected, although expressly contemplated in the agreements, are nevertheless barred by the policy of the Double Jeopardy Clause itself. That policy, however, is no reason why a counseled defendant who agrees to plead to a facially valid indictment should not be held to his bargain, particularly one from which he has received substantial benefits.[16] "The parties could have struck a

[16] Respondents have permanently obtained the benefit of their bargain here. The events of the last six years effectively preclude the United States from prosecuting respondents in response to their refusal to pay the full fines imposed pursuant to the plea agreement. Mr. Broce testified under a grant of immunity at several Oklahoma trials. Moreover, the passage of time, even if the statute of limitations has not yet expired, makes an Oklahoma prosecution a most unattractive

different bargain, but permitting the [United States] to enforce the agreement the parties actually made does not violate the Double Jeopardy Clause" (*Adamson*, slip op. 10).[17]

This Court has long recognized that plea agreements "are consistent with the requirements of voluntariness and intelligence—because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange." *Mabry* v. *Johnson*, 467 U.S. at 508 (footnote omitted). When both the prosecution and the defense make concessions to secure a plea bargain that provides

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and perhaps impossible alternative. As is often the case when a constitutional claim is raised for the first time on collateral attack after an earlier guilty plea, the government is no longer in a position to go forward with a full prosecution of the charges dismissed in reliance on the plea agreement. See, *e.g.*, *United States* v. *Griffin*, 765 F.2d at 681-682; Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1235-1236, 1248, 1257 (1977); see also *Kuhlmann* v. *Wilson*, 477 U.S. 436, 453 (1986) (opinion of Powell, J.); *Davis* v. *United States*, 411 U.S. 233, 241 (1973).

[17] *Adamson* did not, of course, involve the prohibition embodied in the Double Jeopardy Clause against multiple punishments for the same offense. But the acceptance of the possibility that the sentencing court would impose multiple punishments for the two conspiracy charges in this case was part of the bargain that respondents struck with the government, in return for the nonprosecution of charges that carried with them the potential for substantial additional punishment. Respondents acknowledged as much (see p. 4, *supra*). There is no logical reason why a defendant who strikes such a bargain should be able to escape from his bargain any more readily than the defendant who agrees, in return for the dropping of other charges, to plead guilty to a crime he later claims he did not "really" commit. "Respondent[s] [were] fully aware of the likely consequences when [they] pleaded guilty; it is not unfair to expect [them] to live with those consequences now." *Mabry* v. *Johnson*, 467 U.S. at 511.



benefits to each, a court should respect the bargain. The question whether the government could otherwise have prosecuted the defendants on each of two counts is properly treated as foreclosed by the parties' agreement. See *United States* v. *Pratt*, *supra*; *United States* v. *Allen*, *supra*.

Nothing in *Blackledge* or *Menna* affects this analysis, for neither case involved an agreement not to bring other charges in exchange for the defendant's guilty plea. In a different context, this Court has distinguished *Blackledge* on just that ground, holding that its analysis does not apply to "the give-and-take negotiation common in plea bargaining between the prosecution and defense." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 362 (1978); *United States* v. *Goodwin*, 457 U.S. 368, 375-380 (1982); see also *Blackledge*, 417 U.S. at 36-37 (Rehnquist, J., dissenting).

The government's reliance interest is one that Members of this Court have recognized as an important consideration in determining whether a guilty plea should be set aside. See *Dukes* v. *Warden*, 406 U.S. 250, 258 (1972) (Stewart, J., concurring); *id.* at 266 (Marshall, J., dissenting) ("Where the government *can* show specific and substantial harm, the defendant may be held to his plea."); *id.* at 271 n.9 ("Ours is not a case in which, prior to the defendant's motion to vacate his plea, the government had performed its part of a plea bargain and could not be restored to the *status quo ante*.") It was respondents' conduct on which the government relied in failing to prosecute any Oklahoma charges against respondents, and respondents should not be permitted first to induce that reliance by the government and then to take advantage of the government's consequent actions. See Westen, *supra*, 75 Mich. L. Rev. at 1259 (footnote omitted) (a defendant "can * * * forfeit complete defenses to a charge if, by his conduct, he leads the state to believe that it will not have to take him to trial on other outstanding charges"); Westen, *Forfeiture by Guilty Plea—A Reply*,

76 Mich. L. Rev. 1308, 1322 & n.49 (1978); 2 W. LaFave & J. Israel, *Criminal Procedure* § 20.6, at 680-681 (1984); *United States* v. *Pratt*, 657 F.2d at 220 (Pratt "pleaded guilty, presumably, because he preferred the certainty of a maximum of ten years to the risk of conviction and punishment on each of six counts. * * * [W]e think it would be unfair to the United States * * * to consider now the double-jeopardy claim urged by defendant."); see also Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 Mich. L. Rev. 1265, 1293 (1978) ("[i]f the defendant prefers the existing charges to the prospective charges and agrees to forego the double jeopardy defense in exchange for the benefit of not facing the new charges, a court could reasonably respect the bargain, since the government gave up a legitimate opportunity to prosecute in order to please the defendant"); Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. Chi. L. Rev. 741, 760-761 n.91 (1982).

The government agreed not to pursue other charges against respondents in reliance on their promise to plead guilty to two Sherman Act conspiracies, not one. The result of the decision below is that respondents will have secured the full benefit of the government's promise while paying only the fines assessed on one count. Had respondents raised their double jeopardy argument at the time of plea negotiations, the government might have elected to pursue other charges (in particular, Oklahoma conspiracy charges) and either to litigate those charges or to agree that respondents could plead guilty to one Kansas conspiracy and one Oklahoma conspiracy in exchange for the benefits that respondents actually received. But respondents chose a different course, withholding their double jeopardy argument until later, and the court of appeals has now rewarded that delay. We know of no double jeopardy principle—and



*Menna* and *Blackledge* certainly stand for none—that requires that result.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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# In The Supreme Court Of The United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, *PETITIONER*

vs.

RAY C. BROCE
AND BROCE CONSTRUCTION CO., INC.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## BRIEF FOR RESPONDENTS RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

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## QUESTION PRESENTED

Whether a defendant is entitled to a factual determination that a single conspiracy existed after the court determined that two indictments plead to by defendant on their face charged the same conspiracy even though defendant entered a plea of guilty to both indictments pursuant to a plea agreement.

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No. 87-1190

# In The Supreme Court Of The United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, *PETITIONER*

vs.

RAY C. BROCE
AND BROCE CONSTRUCTION CO., INC.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## BRIEF FOR RESPONDENTS RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

### STATEMENT OF FACTS

Respondents Ray C. Broce and Broce Construction Co., Inc. represent a Kansas Corporation and its owner engaged in the highway construction business with its principal office at Dodge City, Kansas.

On November 17, 1981, a two-count indictment was returned against respondents and others charging a violation of Sec. 1 of the Sherman Act (15 U.S.C. 1) and

mail fraud in violation of 18 USC 1341. ("Broce 1") (U.S. v. Broce Construction Co., Inc. et al., Criminal No. 81-20119-01) (D. Kans). Respondent Ray Broce, president of Broce Construction was identified by the Government as a co-conspirator in Broce I. (Pet. App. 143a-151a)

In Count I of Broce I Indictment, it was charged that the respondents had engaged in a combination and conspiracy to submit colusive, noncompetitive and rigged bids on project No. 23-60-RS-1080 (9) (the Meade County project) led by the State of Kansas on April 25, 1978. The indictment charged that the conspiracy began on or about April 1978 and continued thereafter without any date of termination.

In Count II it was charged that the respondents engaged in a scheme and artifice to defraud the State of Kansas and the United States by causing a warrant to be delivered by the United States mail in payment of the project referred to in Count I. (Pet. App. 143a-151a)

By a letter of January 11, 1982, petitioner notified respondents and their attorneys just before trial of the first indictment that the petitioner was going to obtain an additional indictment. This was consistent with petitioner's practice in all prosecutions of alleged bid rigging in the State of Kansas wherein they would notify the respondents prior to trial that in essence that if the respondents did not enter a plea of guilty then petitioner



would obtain another indictment on some other project. After petitioner threatened future prosecution, petioner was notifed that the respondents Ray Broce and Broce Construction wished to enter a plea of guilty to the first indictment. The respondents were in the position of entering a plea of guilty or facing multiple indictments and trials. On January 27, 1982, the respondents entered into a plea agreement with petitioner. Petitioner required that respondents plead to two anti-trust violations with each violation carrying a potential One Million Dollar fine for respondent Broce Construction and One Hundred Thousand Dollars for respondent Ray Broce. Respondent Ray Broce plead guilty to both Counts I and II in the first indictment and was fined and imprisoned on each count. Respondent Ray Broce also was required to plead guilty to the anti-trust violation in the second indictment. Respondent Broce Construction plead guilty to the first count of the first indictment and was fined Seven Hundred Fifty Thousand Dollars. Under the terms of the plea agreement Count II of the second indictment (mail fraud) was dismissed. This eliminated respondent Broce Construction Co. from a potential One Thousand Dollar fine. The petitioner also agreed not to prosecute respondents further in Kansas even though they could not legally do so nor prosecute them in Oklahoma where no charges had nor have ever been filed. Petitioner asks that respondents be presumed guilty of anti-trust violations in Oklahoma without any charges being filed nor

a trial being held. Although the proceedings in Oklahoma are not part of any record in this case, respondent did testify in Oklahoma not pursuant to any plea agreement in Kansas but because he was granted immunity in Oklahoma in exchange for his testimony. Petitioner further agreed to recommend a fine of One and one-half Million Dollars against the corporation on the Sherman Act charges when the maximum legal fine was One Million Dollars. (Pet. App. 127a-128a, 134a-135a)

On February 4, 1982, a second indictment was returned against respondent Broce Construction and respondent Ray Broce. It contained one count for alleged violation of the Sherman Act (15 U.S.C. Sec 1) The indictment in Broce II is identical in all respects to the indictment in Broce I except Jerry Gumm, General Manager of Broce Construction, was eliminated as a defendant; different project numbers are set out with the first indictment referring to a period beginning April 19, 1978 and continuing thereafter without any termination and the second indictment beginning on or about July 19, 1978, and continuing thereafter without any termination; a substitution of terminology where the first indictment refers to "Federal Aid Highway Project" and the second indictment refers to "Public Highway Construction Project" and a paragraph numbering change. (Pet. App. 136a-142a) The respondents and their attorney appeared for a plea on February 8, 1982. Just prior to the plea the respondents and their



attorneys were handed this second indictment. At that time, neither respondnet was advised of their double jeopardy rights. Mr. Crockett, counsel for the respondents at that time, filed a sworn affidavit with the Court that defense counsel did not consider the issue of double jeopardy nor was the issue of double jeopardy discussed with the respondents. Defense counsel did state that he saw no reason "why the Court should not accept these pleas of guilty" (J.A. 43), simply because he didn't see the reason that both indictments charged the same crime (J.A. 72-73). The record clearly demonstrates that the Court advised the respondents of numerous constitutional rights but never at any time discussed the issue of double jeopardy or advised respondents of their double jeopardy rights. The record further shows that this nearly eighty year old respondent in ill health (J.A. 63) was clearly confused as to the government's written statement of facts and there was no clear intention to let each bid-rigging agreement "stand on its own" (J.A. 40-41-42). Petitioner was well aware that any single agreement to rig a bid was necessarily tied to other such agreements. Petitioner states in its official version of the offense that respondents made bid rigging "a way of life" (J.A. 50).

On March 15, 1982, sentence was pronounced in both Broce I and Broce II. The court asked whether there was "any legal reason *** why sentence should not be pronounced" and defense counsel responded:

"None known to the defendant, Your Honor" (J.A. 65). Obviously the defense of double jeopardy was not known to defense counsel or to defendant (J.A. 72-73). In Broce I respondent corporation was fined Seven Hundred Fifty Thousand Dollars and the mail fraud count was dismissed. In Broce II respondent corporation was fined Seven Hundred Fifty Thousand Dollars. Respondent Ray Broce received a fine of Fifty Thousand Dollars and two years imprisonment for each anti-trust charge, the sentences to run concurrent. Respondent Ray Broce was fined the sum of One Thousand Dollars and sentenced to two years on Count II of Broce I. The sentence of imprisonment was concurrent with the previous sentences. The total fine against respondent corporation was One and one-half Million Dollars and the total fine against respondent Ray Broce was One Hundred Thousand Dollars.

On February 22, 1983, respondents, pursuant to F.R. Crim. P. 35 (A) filed a motion to vacate the judgment and sentence in Broce II, claiming that the judgment and sentence in Broce II was illegal in that it violated the double jeopardy clause of the Fifth Amendment of the United States Constitution. Respondents by this motion gave the government notice that respondents were not going to be bound by the plea agreement that violated their rights of double jeopardy. The government could have then filed any charges they felt they could support in Kansas, Oklahoma or any other state. To this date



no additional charges have been filed. The petitioner has instead chosen to attempt to enforce a plea agreement that voids the double jeopardy rights of respondent that were never considered, discussed nor therefore knowingly waived. The motion was made after a decision filed January 31, 1983, in a similar case in the State of Kansas involving other indicted corporations and defendants for bid rigging. In *United States of America v. Beachner Construction Co., Inc.*, 555 S. Supp 1273 (D Kan. 1983) which was affirmed by the court of appeals (729 F.2d 1278 (1984)), District Judge Saffels found after an evidentiary hearing that the conspiracy to rig bids on Kansas highway construction projects was a continuing conspiracy and that subsequent prosecutions of an acquitted corporation constituted double jeopardy. The district court denied the motion of respondents by concluding that respondents had waived their right to the double jeopardy claim and their right to challenge the sentence on that basis by pleading guilty. The district court did not address the question of whether there was one or multiple conspiracies. (Pet. App. 112a-123a)

The court of appeals reversed in *United States v. Broce*, 753 F.2nd 811 (10th Cir. 1985) and petitioner requested a new hearing *en banc*. The Court sitting *en banc* concluded from the facts that the plea of guilty did not waive the defense of double jeopardy under the circumstances of this case. *United States v. Broce*, 781 F.2d 792, (10th Cir. 1986). The Court remanded

the case for a determination on the evidence as to the existence of a single or separate conspiracy. Although petitioner stipulated that the record in the Beachner evidentiary hearing be used as part of the factual record they contend that in a memo they sent to the district court they preserved their argument that respondents forfeited any double jeopardy defense. (Pet. App. 22a) The record shows Judge Saffels analized the usual and common system of setting up Kansas highway jobs; the common language; the lack of precautions; the continuing obligations among contractors; the necessity of telling other contractors if everyone had agreed "to go along", the common purpose and objective; and concluded that bid rigging was "a way of life in Kansas". (Pet. App. 22a-23a)

Guided by the common objective test in *United States v. Wilshire Oil Company of Texas*, 427 F.2d 969 (10th Cir.) Cert. Denied, 400 U.S. 829 (1970) the District Court held that the conspiracies charged as anti-trust violations in Broce I and Broce II were a single conspiracy and ordered the conviction in Broce II vacated as to respondents. (Pet. App. 5a-13a)

Petitioner once again appealed arguing that the District Court erred in finding that factually there was one continuing conspiracy. The government also urged the court to reconsider its en banc opinion of January 2, 1986.



The court of appeals, after considering this Court's most recent case in this area of the law, *Ricketts v. Adamson*, No. 86-6 (June 22, 1987), wrote (Pet. App. 1a-3a):

> ". . . Although *Ricketts* invalidates the broader rationale underlying the plurality opinion in *Broce*, that the double jeopardy prohibition "does not constitute an individual right which is subject to waiver," 781 F.2d at 795, it does not affect its narrower holding, based on clear Supreme Court precedent, that a guilty plea does not itself constitute a waiver of double jeopardy protection. Id. at 796-97; see also *Menna v. New York*, 423 U.S. 61, 62-63 & n.2 (1975) (guilty plea is merely an admission of factual guilt, which does not bar a claim that the state may not constitutionally prosecute the defendant no matter how validly his factual guilt is established); *Blackledge v. Perry*, 417 U.S. 21, 20-31 (1974). To the extent that the government's first argument may read as requesting reconsideration of the court's en banc dispostion, we will not do so. 10th Cir. R. 35.6
>
> The government next argues that the district court's factual finding that both indictments charged a single conspiracy was clearly erroneous. We have examined the record carefully and we are satisfied that the district court's decision was not clearly erroneous. cf *United States v. Beacher Construction Co.*, 729 F.2d 1278, 1281-83 (10th Cir. 1984)."

Petitioner's request for rehearing was denied and the petitioner's suggestion for rehearing en banc was also denied (Pet. App. 124a-125a)

## SUMMARY OF ARGUMENT

There is no dispute that the double jeopardy clause in the Fifth Amendment prohibits the infliction of multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711 (1969). There is no dispute that if the two indictments brought against these defendants were based upon and reflect only one conspiracy then the defendants may not be punished twice. The position that a counseled plea of guilty waives a conviction to a charge that violates the double jeopardy clause has been specifically rejected by this Court. *Menna v. New York*, 423 U.S. 61 (1975). The Court of Appeals correctly interpreted the decision in *Menna* to act as a bar to the government's attempt to obtain two convictions for the same conspiracy. The government seeks to establish that the indictments clearly charge two separate conspiracies and secondly seeks a determination that *Menna* does not apply to a counseled plea of guilty when there is a plea agreement.

A. The petitioner's claim of waiver is based in part upon the government's interpretation that the indictments clearly charged two separate conspiracies on their face. The respondents by entering their plea of guilty have admitted their guilt as conspirators. The defendants continue to admit their factual guilt in that they conspired to rig bids on projects let by the State of Kansas. However, since there was a single, continuing



conspiracy to rig as many bids as possible on projects in the State of Kansas, the petitioner could legally charge the crime of conspiracy but once against these defendants.

Each indictment brought against the defendants was couched in vague terms to conceal the fact that the government was seeking two convictions for one criminal act.[1] The indictments merely show that the defendants were involved in a continuing conspiracy to which the defendants have admitted their factual guilt. The indictments do demonstrate that during the terms of the conspiracy the defendants conspired to set up more than one project involving different sections of Kansas road projects. However, the indictments on their face do not demonstrate separate conspiracies and in fact allege the conspiracies in each indictment to be taking place over the same period of time.

B. Petitioners next raised the issue as to whether the fact that the defendant entered into a plea agreement constitutes a waiver of a double jeopardy claim. This Court has held in *Menna* that a conviction must be set aside even if it was entered pursuant to a counseled plea of guilty where the United States Constitution precludes the prosecution of a second charge. *Menna*

[1]Each indictment charges the same conspirators with the exception that Gerald R. Gumm was omitted from the second indictment by agreement. The other conspirators charged that in each indictment are various persons and firms not made defendants herein. Each indictment refers to the time of the conspiracy with a statement "the exact dates being to this grand jury unknown." (Pet. App. 137a and 144a, 139a and 147a)

did not specifically state that the charges must be set aside even if the conviction was entered pursuant to a counseled plea of guilty which is reduced in writing in a form of plea agreement. The obvious interpretation of *Menna* is that a second conviction for the same offense in violation of the double jeopardy clause of United States Constitution is equally invalid after a counseled plea of guilty where a plea agreement drawn by the government has been entered into by the defendant to prevent further prosecutions for the same offense.

To allege that the respondents receive substantial benefits from the plea agreement is to ignore reality. The government promised not to prosecute them for bid-rigging activity in Kansas for which the government received a conviction. The petitioner never had a legal basis to pursue the defendants with multiple prosecutions because the defendants were part of one continuing conspiracy to rig bids on highway projects in the State of Kansas. The government's promise not to pursue multiple indictments for being part of a single conspiracy was only an agreement that the government would not again violate the double jeopardy clause of the United States Constitution. There were no indictments pending against the defendants in the State of Oklahoma nor had the defendants been notifed of any potential charges. The government seems to argue the position that the second conviction in the State of Kansas was in reality a conviction for the defendants' activity in the State of Oklahoma. Petitioner advances the argument that a plea agreement constitutes a type of contract. Certainly a contract requires an understanding from both sides as to the rights of each party. In this case, the Kansas counsel was faced with the government's promise of future indictments for the same conspiracy in the State of Kansas. It was the threat of future indictments based upon a single conspiracy that led Kansas counsel to enter into a plea agreement for his client. Unfortunately, the Kansas counsel never considered the legality of the government's position. It is unrealistic to advance the position that the Kansas counsel was advising his client to plead guilty to criminal acts in other jurisdictions where no allegations had been made nor charges brought against defendants.



Petitioners argue that the defendants sought to avoid the greater liability for other bid-rigging activities in both Kansas and Oklahoma. In reality there were no other charges for the government to pursue. Petitioners furthermore notified the defendants that the plea agreement did not constitute a bar to prosecution in the State of Oklahoma. The defendants by their motion brought within thirteen (13) months of the sentencing date to vacate the sentence put the government on notice that the defendants considered the plea agreement invalid and a violation of their constitutional rights.

## ARGUMENT

RESPONDENTS DID NOT WAIVE THEIR DOUBLE JEOPARDY RIGHT BY ENTERING A PLEA OF GUILTY.

The leading case concerning waiver of the double jeopardy provision of the Fifth Amendment of the Constitution is *Menna v. New York, supra.* In that case, Menna had refused to answer questions before a New York State grand jury after a grant of immunity. He was adjudged in contempt and sentenced to thirty (30) days in jail which he served. Approximately two years later he was indicted for the same conduct. Menna entered a counseled plea of guilty to the indictment after asserting unsuccessfully in the state court that the indictment violated the double jeopardy provision of the Fifth Amendment. He appealed raising the double jeopardy claim but the New York Court of Appeals declined to address the double jeopardy claim on the merits, holding that it had been waived by Menna's counseled plea of guilty.

The United States Supreme Court reversed in a *per curiam* decision holding that where the State is precluded by the United States Constitution from hauling a defendant into a Court on a charge, Federal Laws require that a conviction on that charge be set aside even if conviction was entered pursuant to a counseled plea of guilty. Some ambiguity is created by the Court's



statement in footnote 2 that "We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that — judged on its face — the charges on which the State may not constitutionally prosecute." The Court left unanswered the question of what constitutes a valid waiver of a Fifth Amendment claim and whether a plea of guilty entered pursuant to a plea agreement constitutes a waiver of the double jeopardy claim. Since most, if not all pleas of guilty, are subject to some negotiations, it would seem logical that a plea agreement has no more effect on an invalid charge than the fact that the defendant was represented by counsel.

This Court's ruling in both *Blackledge v. Perry,* 417, U.S. 21 (1974), and *Menna,* hold that the government is prohibited from instituting charges that violate the Fifth Amendment double jeopardy clause. The prohibition is absolute and the defendants entering into a plea agreement does not confer upon the government the right to violate the constitution any more than the defendants entering a plea of guilty. In *Blackledge,* the defendant was convicted of a misdemeanor and sought a trial *de novo* in a higher court. The prosecution returned a felony indictment for the same conduct upon which the defendant had been convicted of a misdemeanor. This Court overturned the defendant's conviction which resulted from a plea of guilty to the felony charge holding that it violated the due process clause.

This Court stated that the claim of constitutionally goes to "the very power of the State to bring the defendant into Court to answer the charge," *Blackledge*, 417 U.S. at 30. The respondents complaint goes to the same constitutional prohibition and that is the power of the government to bring a second indictment which violates the double jeopardy clause. Petitioner asks the Court to reject the rulings in *Blackledge* and *Menna* and apply *Tollett v. Henderson*, 411 U.S. 258 (1973) and the *Brady* trilogy.[2] This Court recognized in *Tollett* and the *Brady* Trilogy that there were circumstances in which a defendant may decide to enter a plea of guilty rather than face the uncertainty of trial. All these cases deal with the validity of the defendants conviction based upon the defendants admission of factual guilt and not the legal right of the government to institute charges in the first place.

The government further relies on *Ricketts v. Adamson*, No. 86-6 (June 22, 1987) where a majority of this Court found that it was the defendants intent under the specific terms of that plea agreement to waive his double jeopardy rights. In *Ricketts* the defendant entered into a plea agreement specifically stating that the reduction in charges was based upon his agreement to testify against other defendants. This Court found under the terms of that agreement that the defendant

[2]*Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).



had specifically intended to waive his double jeopardy rights. A waiver of a double jeopardy claim must be a waiver as defined in *Johnson v. Zerbest*, 304 U.S. 458 (1938). That case defined a waiver as the intentional relinquishment or abandonment of known right or privilege. In this case the government couched its indictment in vague terms to conceal the very nature of a double jeopardy claim. The defendant was not aprised of his double jeopardy rights and his counsel failed to consider the double jeopardy claim.

## A. THE VAGUE INDICTMENTS BROUGHT BY THE GOVERNMENT REQUIRE A FACTUAL DETERMINATION OF THEIR VALIDITY.

The indictments in this case refer to two different Kansas Highway projects but to only one conspiracy. The essence of a conspiracy offense is an agreement to commit an unlawful act. *Ianelli v. United States*, 420 U.S. 770 (1975). A single agreement to commit more than one criminal act is still a single agreement and may not be prosecuted as more than one conspiracy. *Braverman v. United States*, 317 U.S. 49 (1949). Although the government admits that there was a single conspiracy at one time it offered no evidence of the conspiracy's termination. (J.A. 50) A conspiracy, once shown to exist, is presumed to continue until proof of its termination is established. The government alleged and the Trial Court agreed that the defendants were part of a conspiracy that had made "bid-rigging a way of life in

Kansas." It is the government that retains exclusive control over the drafting of indictments. In *United States v. Inmon*, 568 F.2d 326, 332 (3rd Cir. 1977), aff'd on rehg, 597 F.2d 352 (3rd Cir. 1979) the Court stated "besides the practical considerations respecting access to proof, to which we referred earlier, we also point to the obvious fact that the government has control over the drafting of the indictments. Any burden imposed by the imprecision of separate offenses should be borne by it." The government contends that the indictments are facially valid because each refers to a different project which therefore constitutes two different agreements. The government confused the nature of a conspiracy as opposed as to the actual agreement to set up a project. The government appears to argue that a conspirational "agreement" must be shown that incompasses a specific, explicit, meeting of the minds, and consideration, much in the form of a formal contract. "[N]o formal agreement is necessary to constitute an unlawful conspiracy." *American Tobacco Company v. United States*, 328 U.S. 781, 809 (1946). A tacit understanding based upon a long course of conduct has been held sufficient to constitute a conspirational agreement. *Direct Sales Co. v. United States*, 319 U.S. 703 (1973); *United States v. Consolidated Packing Corp.*, 575 F.2d at 126.

The rulings in *Kerrigan v. United States*, 644 F.2d 47 (1st Cir. 1981) and in *Kotteakos v. United States*, 328 U.S. 750 (1946) are not controlling in this case. In



*Kerrigan* the defendant was sentenced on the basis of guilty pleas on two indictments which the Court found specifically eliminated the claim of double jeopardy. Both indictments in *Kerrigan* were alleged to commence on a specific date and the conspiracy ended on a specific date. The Court found that there were two different indictments alleging separate periods of times for the two conspiracies which overlapsed by only one day. The Court specifically noted that the indictments named overlaping but different groups of conspirators. *Kerrigan v. United States*, 644 F.2d 47 at 49. The Court in *Kerrigan* found from the face of the indictments that "the two agreements charged related to commission of crimes which were similar but distinct." In this case the government admits in its own drafting of its indictments that each project was let at a given bid letting on a specific date and that the conspiracy continued thereafter, the exact dates being to this grand jury unknown. The conspirators in each indictment were the same persons and firms with the exception of the government's general allegation that various persons and firms not made defendants herein participated as co-conspirators. The only difference alleged by the government is that the projects which were subject to the conspiracy were bid on separate dates.[3]

[3]Judge Bohanon in the original opinion of Court of Appeals panel dated January 9, 1985, made a paragraph by paragraph comparison of the two indictments and found them to be identical in many respects and regarding the differences found that nothing in either indictment demonstrates two separate conspiracies. Judge Bohanon's analysis is not repeated here as it appears in petitioners appendix pages 102a to 106a.

The government's reliance on *Kotteakos v. United States*, 328 U.S. 750 (1946) is misplaced. In *Kotteakos* none of the co-conspirators, except one, participated in any way, by agreement or otherwise, in the individual transaction. 328 U.S. at 754. The Supreme Court distinguished *Kotteakos* in a subsequent case where, as here, aid was given to other co-conspirators and there was a common objective among them. *Blumenthal v. United States*, 322 U.S. 539 (1947) It cannot be the government's election to decide arbitrarily if there is one agreement or several.[4]

It is this type of conduct that Justice Brennan spoke to in *Abbate v. United States*, 359 U.S. 187, at 196 (1959) where he points out that the basis of Fifth Amendment protection against double jeopardy is that a person shall not be harassed by separate trials. *United States v. American Honda Motor Co.*, 271 F.2d 979 (N.D.Cal. 1967).

The contention that setting up a given project on specific terms establishes that a new conspiracy exists is without merit. The government in its brief places dis-

[4]As stated in *United States v. Palermo*, 410 F.2d 468, 470 (7th Cir. 1969) "The government is not free to arbitrarily decide whether there is one agreement or several. If the agreement . . . contemplates bringing to pass a continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies rather than to call it a single one. *United States v. Kissel*, 218 U.S. 601, 607 (1910). To convict a party severally for being part of two conspiracies when in reality he is involved in one overall conspiracy would be convicting him of the same crime twice."



torted emphasis on Mr. Broce's statement that each project would "stand on its own" (J.A. 41). Mr. Broce is alleged to have made the statement to a contractor at a bid letting when that contractor requested a future project in consideration for not bidding a project at that letting. The defendants do not contend that all projects were set up at the same time or that the "setting-up" of future projects did not depend upon the availability of projects, the size of the companies and the number of projects already allotted to a given conspirator. What is clear from Mr. Broce's statement is that there was no doubt in the conspirators minds that future projects would be set up if possible. The statement itself is clear proof of a continuing conspiracy. There is no evidence of withdrawal from the conspiracy or any acts which constitute a termination of a conspiracy and every intent existed among the contractors to set up the future projects at the time of the letting. While the terms of each project may not have been fully worked out there was never any doubt that the conspiracy was in place to be plugged into by the contractors.

The government seeks the benefit of bringing charges of a continuing conspiracy in each indictment because it allows the government to introduce "similar acts" in their case in chief. However useful this tactic is to the government it should not be used to contravene constitutional guarantees and if the government chooses to draft indictments in this form it must do so with the

understanding that a conviction for a second indictment cannot stand if it involves substantially the same conspiracy as the first. *Short v. United States*, 91 F.2d 614 (4th Cir. 1937) The defendants admission of factual guilt goes only to the nature of the conspiracy and not to whether one or more conspiracies existed. *Launius v. United States*, 575 F.2d 770 (9th Cir. 1978) As the Court of Appeals held, it appears on the face of the indictments that one agreement was involved and hence one conspiracy. The Court of Appeals correctly remanded the case to District Court for a factual determination as to the nature of the conspiracy. The government had previously stipulated that the *Beachner* transcript was to be made part of the record for the basis for determining the nature of the conspiracy. The record before the Court clearly demonstrated a single conspiracy.

B. THE GOVERNMENT'S REQUIREMENT AS PART OF A PLEA AGREEMENT THAT THE DEFENDANT ENTER A PLEA OF GUILTY TO TWO INDICTMENTS DOES NOT INVALIDATE THE DOUBLE JEOPARDY CLAIM.

The government claims that its reliance upon its contract with the defendant should act as a bar to defendant's constitutional right against double jeopardy. The facts of this case are not consistent with the concept of a voluntary and intelligent waiver of rights by a plea agreement as contemplated in *Mabry v. Johnson*, 467 U.S. 504, 508 (1984). At the time Ray Broce entered



a plea for himself and both construction companies he was an eighty year old defendant in ill health facing his first criminal conviction. Shortly before trial on a charge of conspiracy to violate anti-trust laws, Mr. Broce and his attorney were notified that the government was considering additional prosecutions against Mr. Broce and Broce Construction Company in the State of Kansas. The defense attorneys notified the government on behalf of their clients that the defendants wished to enter a plea of guilty. The government required the defendants to plead guilty to two counts of anti-trust violations and returned a second indictment just four days prior to the plea hearing. Threatened by government prosecutors with a series of indictments for each highway project the government believed to have been rigged, defendants accepted the plea bargain in the form of an agreement. On February 8, 1982, the defendants entered pleas of guilty to both indictments. At that hearing, the defendants were apprised of numerous constitutional rights and the Court stated to the defendant "and do you understand that by entering pleas of guilty that you would be waiving or giving up all of these constitutional rights that I have just explained to you?" (J.A. 34-35) The Court inquired of Mr. Broce if he had gone over the four page statement of facts in support of the pleas and his response was "I guess I have". (J.A. 40) The defendants were never advised of any right against double jeopardy by the Court, the government or their own

attorneys. Counsel for the defendants in fact filed an affidavit stating that they had never considered the prohibition against double jeopardy. The defendants never contemplated a waiver of their double jeopardy rights. The rule is that Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the loss of fundamental rights. *Johnson v. Zerbest, supra.* The government basis their claim of an intentional relinquishment or abandonment of a known right or privilege upon the existence of a plea agreement. The facts in this case are clearly distinguishable from *United States v. Scott,* 437 U.S. 82 (1978). In that case the defendant moved for a dismissal of two counts of an indictment and this Court found that the deliberate choice to seek termination of those proceedings on a basis unrelated to factual guilt or innocence suffers no injury cognizable under the double jeopardy clause. In *Ricketts v. Adamons, supra* this Court found that respondent unquestionably understood the meaning of the provisions of the plea agreement and that the terms of the agreement could not be clearer. In neither case did this Court condone two convictions for one criminal offense.

In this case it was not the actions of the defendants which caused them to be subject to two prosecutions for a single offense. The petitioner boldly asserts that the defendant receive substantial benefits from the plea bargain. The corporation did have Count II which was



for mail fraud dismissed. The government gave up a potential fine of One Thousand Dollars in exchange for a potential fine of One Million Dollars. The plea agreement further provided that the defendants would not be prosecuted for additional crimes on account of any colusion between defendant and other contractors regarding highway, street or airport runway construction projects let by awarding authorities within the State of Kansas and Oklahoma prior to the date of the agreement. Since it has been established that there is only one conspiracy in the State of Kansas no additional prosecutions were possible even absent a plea agreement. No indictments existed in Oklahoma and any potential indictments would be purely speculative. The defendants were informed by the government that if they cooperated and testified in Oklahoma then the government would not seek to prosecute defendants in Oklahoma but it is clear that it was the threat of multiple prosecutions in Kansas that caused the guilty pleas to be entered.

Both *Ricketts* and *Scott* cited by petitioner rely on charges that the government had a constitutional right to bring against the defendants in the first place. The plea bargain entered into by the respondents rely upon a charge that the government could never constitutionally bring against the defendants. The reason petitioner does not seek the same remedy sought in *Ricketts* is because *Ricketts* was based on a constitutionally valid

charge whereas without specific performance of the plea agreement the government could not through any legal prosecution obtain the penalty imposed in this case. As stated in *Menna*, a constitutionally invalid charge is not made valid by a counseled plea of guilty. Nor is a constitutionally invalid charge made valid by a counseled plea of guilty pursuant to a plea agreement. The government is not in the position to advance the theory of equity when any disadvantage the government suffered was due to its own actions.

## CONCLUSIONS

The judgment of the court of appeals should be affirmed.

Respectively submitted.

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No. 87-1190

# In the Supreme Court of the United States

OCTOBER TERM, 1988

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UNITED STATES OF AMERICA, PETITIONER

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

---

*ON WRIT OF CERTIORARI TO*
*THE UNITED STATES COURT OF APPEALS*
*FOR THE TENTH CIRCUIT*

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## REPLY BRIEF FOR THE UNITED STATES

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1190

UNITED STATES OF AMERICA, PETITIONER

*v.*

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

1. Respondents defend the court of appeals' decision by claiming that, as a matter of law, the two indictments "merely show that the defendants were involved in a continuing conspiracy" (Resp. Br. 11). That assertion is unfounded. The en banc court of appeals regarded the question whether the two conspiracies were separate as a factual question that required a remand for a "factual determination" (Pet. App. 24a) by the district court. Moreover, respondents place unwarranted reliance on the fact that the two indictments do not allege ending dates for the two conspiracies. The ending dates are not stated in the indictments because the grand jury did not know when the conspiracies ended. Nevertheless, nothing in either indictment supports respondents' claim that "the conspiracies in each indictment [took] place over the same period of time" (Resp. Br. 11). In any event, even if the two conspiracies (which began 15 months apart) overlapped in time to some degree, that fact alone would not compel the conclusion

that the two separately charged conspiracies were actually part of one large conspiracy. *E.g., United States* v. *Sargent Elec. Co.*, 785 F.2d 1123, 1130 (3d Cir.), cert. denied, 479 U.S. 819 (1986); *United States* v. *Sinito*, 723 F.2d 1250, 1257 (6th Cir. 1983), cert. denied, 469 U.S. 817 (1984); *United States* v. *Inmon*, 594 F.2d 352, 354 (3d Cir.) (time period of first conspiracy completely subsumed within period of second conspiracy), cert. denied, 444 U.S. 859 (1979); *United States* v. *Wilshire Oil Co.*, 427 F.2d 969 (10th Cir.), cert. denied, 400 U.S. 829 (1970). Conspiracies that overlap in time *can* be part of a single conspiracy with multiple objects, but they can also be "separate adventures of like character" (*Kotteakos* v. *United States*, 328 U.S. 750, 769 (1946)); everything depends on the scope of the conspiratorial agreement or agreements. There is no internal inconsistency between the government's assertion that there were two separate conspiracies (J.A. 51) and an assertion that the two conspiracies overlapped in time.

Respondents' contention that the indictments do not allege separate conspiracies skirts the issue that was presented by their motion to vacate the conviction on the second indictment—whether their guilty pleas foreclosed later factual proceedings designed either to contradict or to supplement the allegations in the indictments. On its face, each indictment charges a separate conspiracy—one consisting of an agreement beginning in April 1978 to rig the Meade County project (see Pet. App. 147a), and a second consisting of an agreement beginning in July 1979 to rig the Barton County project (see *id.* at 139a). Respondents do not dispute that if those agreements were separate, then two conspiracies existed.[1] Rather, they

[1] Respondents do, however, repeatedly mischaracterize our basis for saying that the indictments on their faces charged two separate conspiracies. We do not contend that the indictments facially charge two separate conspiracies merely "because each refers to a different project" (Resp. Br. 18), nor have we ever "conten[ded] that setting up a given project on specific terms establishes that a new conspiracy exists" (*id.* at 20), nor do we "argue that a conspiratorial 'agreement' must be shown * * * much in the form of a formal contract" (*id.* at 18). Rather, we contend that agreements to rig different projects can be one conspiracy or two different conspiracies depending on the facts, and that allegations that they are two distinct agreements, beginning on two different dates, suffice to require the defendants, if they think the facts are otherwise, to put the government to its proof rather than to plead guilty and claim a double jeopardy violation later.



claim that "there was a single, continuing conspiracy to rig as many bids as possible" (Resp. Br. 10-11). There are, however, no facts alleged in the indictments that support that claim. Thus, respondents can assert their single-conspiracy theory in support of their belated double jeopardy defense only by refuting the allegations in the indictments and supplementing the record with additional factual findings. As we showed in our opening brief, neither the Double Jeopardy Clause nor any decision of this Court requires that they be allowed to do so.

Respondents observe that "[a]lthough the government admits that there was a single conspiracy at one time it offered no evidence of the conspiracy's termination" (Resp. Br. 17). In attributing significance to that fact, respondents ignore the nature of guilty-plea proceedings. The government did assert in its Official Version of the Offense that the large conspiracy ended in 1973 and was followed by separate conspiracies (J.A. 50-51). The government "offered no evidence" to back up that assertion because respondents formally relieved the government of its burden to do so. By pleading guilty, they " 'stipulat[ed] that no proof by the prosecution need be advanced' " and " 'supplie[d] both evidence and verdict,

ending controversy.' " *Boykin* v. *Alabama*, 395 U.S. 238, 242-243 n.4 (1969) (quoting *Woodard* v. *State*, 42 Ala. App. 552, 558, 171 So. 2d 462, 469 (1965)).[2]

Although respondents repeatedly complain that the indictments in this case were vague (Resp. Br. 11, 17, 18), they were obliged to raise those objections to the indict-

[2] At the time of the guilty pleas in this case the government had compelling reasons to believe that there was no single conspiracy to rig bids in Kansas after 1973. First, respondents never challenged the government's assertions that there was no single conspiracy after 1973 and that respondents had participated in separate conspiracies to rig the bids here at issue. Second, there was considerable evidence to support the government's assertion that the single conspiracy ended in 1973. That was the year in which the organizer of the conspiracy went out of business; none of the other conspirators assumed its role (J.A. 50). Shortly thereafter, the State of Kansas changed its bid-letting procedures (*Beachner* Tr. 150-151). Thus, every witness that testified concerning this issue had "denied any overall agreement or understanding or participation in a single conspiracy" after 1973. *United States* v. *Beachner Constr. Co.*, 555 F. Supp. 1273, 1278 (D. Kan. 1983), aff'd, 729 F.2d 1278 (10th Cir. 1984). Indeed, whereas almost 100% of all state highway construction contracts were rigged before 1973, after that date only about 10% were rigged and the remaining 90% were bid competitively (*Beachner* Tr. 139-141, 198, 274-275, 386-387, 425). In these circumstances, the fact that bid rigging may have been " 'a way of life in Kansas' " (Resp. Br. 17-18 (quoting J.A. 50)), is no more telling than the fact that drug dealing might be a way of life in many cities; it does not without more make all bid riggers into co-conspirators in one large conspiracy any more than a drug epidemic in any given city would make all drug dealers into co-conspirators in one large conspiracy. In either case, the scope of any conspiracy would depend on the scope of the agreement. Finally, although the *Beachner* court subsequently concluded that there was a single conspiracy to rig bids in Kansas after 1973 (a judgment with which we do not agree but one that we do not challenge in this Court), it did so in a case in which the defendants elected to put the government to its proof and, unlike respondents in this case, did not accept the government's factual assertions by pleading guilty.



ments before pleading guilty. It is true that it is the prosecution (together with the grand jury) that determines what facts will be alleged in an indictment.[3] But the law provides a procedure for a defendant who thinks that the government's version of the facts is either inaccurate or incomplete: the defendant can contest the government's theory of the case either through pretrial motions or by the introduction of evidence during trial. A defendant may agree with the government's version of the facts and may plead guilty for that reason; or he may disagree with the government's version of the facts yet feel that he has more to gain by pleading guilty than by litigating over that disagreement;[4] or he may disagree with the government's version of the facts and choose to litigate. What the defendant may not do is keep silent about his disagreement with the government's version of the facts, plead guilty, and later insist that the Constitution gives him a

[3] For that reason, the court in *United States* v. *Inmon*, 568 F.2d 326, 331-332 (1977), aff'd on reh'g, 594 F.2d 352 (3d Cir.), cert. denied, 444 U.S. 859 (1979), on which respondents rely (Resp. Br. 18), held that it is the government that should bear the burden of proof when a defendant claims that the crime with which he is charged is the same as one to which he has already pleaded guilty. In *Inmon*, the defendant did not plead guilty to the indictment that he claimed placed him in jeopardy for a second time, but moved to dismiss that indictment on double jeopardy grounds. It was in that context that the court said the government should bear the "burden imposed by the imprecision in the description of separate offenses" (568 F.2d at 332). *Inmon* would be on point only if respondents had raised their double jeopardy issue rather than pleading guilty and the government had claimed that it did not bear any burden of showing that the offenses were not the same for double jeopardy purposes.

[4] Cf. *North Carolina* v. *Alford*, 400 U.S. 25 (1970). The defendant's cost-benefit calculus may be accurate or inaccurate, but that makes no difference. *Brady* v. *United States*, 397 U.S. 742, 757 (1970).

right to litigate a factual issue that he had no valid reason to postpone. Unconditional guilty pleas are for defendants who choose not to litigate issues of fact. Here, respondents chose not to put the government to the test on the one-conspiracy-or-two issue, and they can show no reason why they should not be held to that choice.

2. Respondents contend (Resp. Br. 17, 23-24) that their guilty pleas cannot foreclose their subsequent pursuit of a double jeopardy claim unless they entered into those pleas with the specific intent to "waive" double jeopardy rights, *i.e.*, unless the pleas constituted "an intentional relinquishment or abandonment of a known right or privilege" (*Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). Because it apparently did not occur to their attorney to raise a double jeopardy claim before respondents pleaded guilty (see J.A. 72-73), they argue that the guilty pleas in this case were not "waivers" and therefore do not affect their ability to raise a double jeopardy claim at any later time. Respondents' claim that the *Johnson* v. *Zerbst* standard rules this case, however, is conclusively refuted by the authorities cited in our opening brief and in fact is inconsistent with at least three lines of cases decided by this Court.

First, respondents' waiver claim is inconsistent with this Court's double jeopardy jurisprudence. This Court has in various circumstances held—without inquiring into the defendants' specific intent to "waive" double jeopardy rights—that defendants, by their actions, have lost double jeopardy claims that otherwise would be honored. See *Jeffers* v. *United States*, 432 U.S. 137, 150 n.15 (1977) (plurality opinion) (defendant's objection to successive prosecution of conspiracy and continuing-criminal-enterprise charges held forfeited because defendant did not discharge his "obligation to preserve his double



jeopardy point properly"); *id.* at 152, 153-154 & n.22; *United States* v. *Scott*, 437 U.S. 82, 98-99 (1978) (defendant's decision to seek midtrial termination of proceedings on grounds unrelated to factual guilt or innocence held to permit a government appeal and possible second trial, without any suggestion that the defendant's decision to seek a midtrial termination must have been made with the intent to "waive" double jeopardy rights).

Second, respondents' assertion that they must prevail in the absence of a *Johnson* v. *Zerbst* waiver is inconsistent with this Court's guilty-plea jurisprudence. In *Tollett* v. *Henderson*, 411 U.S. 258 (1973), the defendant claimed (and the court of appeals agreed, see 411 U.S. at 260) that he could collaterally attack his guilty plea because he had not, through his plea, intended to "waive" his constitutional right to challenge the racial composition of the grand jury. This Court squarely rejected that approach to guilty-plea cases (*id.* at 266):

> If the issue were to be cast solely in terms of "waiver," the Court of Appeals was undoubtedly correct in concluding that there had been no such waiver here. But just as the guilty pleas in the *Brady* trilogy [*Brady* v. *United States, supra; McMann* v. *Richardson*, 397 U.S. 759 (1970); *Parker* v. *North Carolina*, 397 U.S. 790 (1970)] were found to foreclose direct inquiry into the merits of claimed antecedent constitutional violations there, we conclude that respondent's guilty plea here alike forecloses independent inquiry into the claim of discrimination in the selection of the grand jury.

This Court's subsequent decisions in *Blackledge* v. *Perry*, 417 U.S. 21 (1974), and *Menna* v. *New York*, 423 U.S. 61 (1975), permit certain collateral attacks on guilty pleas notwithstanding *Tollett* and the *Brady* trilogy, but they contain not the slightest hint of retreat from the proposi-

tion that the foreclosure by constitutional claims by guilty plea requires no *Johnson* v. *Zerbst* "waiver."

Third, respondents' reliance on *Johnson* v. *Zerbst* is inconsistent with this Court's cases applying the contemporaneous-objection rule to foreclose inquiry into claimed constitutional defects in trial procedure. There is no doubt that counsel's failure to raise constitutional claims at trial often results from oversight in the midst of trial rather than from any intention to relinquish a known right. Yet "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before the tribunal having jurisdiction to determine it." *Yakus* v. *United States,* 321 U.S. 414, 444 (1944); see also *Estelle* v. *Williams,* 425 U.S. 501, 508 n.3 (1976) (*Johnson* v. *Zerbst* standard does not apply to "strategic and tactical decisions, even those with constitutional implications, by a counseled accused"; rather, "if the defendant has an objection, there is an obligation to call the matter to the court's attention so the trial judge will have an opportunity to remedy the situation"). If a defendant can lose valid constitutional objections merely because he and his counsel fail to notice those objections in the heat of trial, it follows *a fortiori* that counsel's failure to notice such objections before advising his client to plead guilty is no basis to reopen matters that were fair subjects for litigation before the guilty pleas were entered.

For all of these reasons, it is irrelevant to the outcome of this case that, before respondents pleaded guilty, their counsel failed to discuss with them any possibility of raising the double jeopardy challenge that they subsequently pursued. See also *Tollett,* 411 U.S. at 267.[5] The indictments in

[5] Respondents' repeated assertion that trial counsel "didn't see the reason that both indictments charged the same crime" (Resp. Br. 5; see also *id.* at 6, 13, 17, 24) is irrelevant. Respondents have never asserted that they received ineffective assistance of counsel. Indeed, given the benefits that respondents received from the plea agreement, and the strong (though ultimately unsuccessful) arguments supporting the factual proposition that there were in fact multiple conspiracies (see note 2, *supra*), it would be untenable for respondents to claim that their counsel was ineffective in failing to recognize and pursue what was at that time an imaginative and untested theory concerning the factual relationship among various Kansas bid-rigging episodes. Similarly, although respondents appear to suggest that their guilty pleas were not knowing and voluntary (Resp. Br. 3, 5, 23), they did not raise that issue in their Rule 35 motion. In any event, the district court found that the guilty pleas were knowing and voluntary at the time it accepted the pleas (J.A. 43).



this case were facially valid, and respondents' failure to raise their fact-based double jeopardy challenge before pleading guilty permanently forecloses that challenge, without regard to respondents' subjective intent.

3. Respondents defend on two grounds the court of appeals' conclusion that the plea bargain in this case had no effect on their double jeopardy claim. Respondents first claim that this Court's decisions in *Menna* v. *New York, supra,* and *Blackledge* v. *Perry, supra,* hold that the Double Jeopardy Clause's prohibition against instituting a second prosecution for an offense previously charged is "absolute" and that plea agreements cannot alter that prohibition (Resp. Br. 15). As even the court of appeals eventually came to recognize (Pet. App. 2a), however, this Court's decision in *Ricketts* v. *Adamson,* No. 86-6 (June 22, 1987), directly refutes that claim. In *Adamson* this Court held, relying on the terms of a plea agreement, that a state may institute a first-degree murder charge for the same crime for which a defendant had been convicted of second-degree murder pursuant to a guilty plea.

Respondents claim that *Adamson* is inapplicable because that case "rel[ies] on charges that the government had a constitutional right to bring against the defendant[] in the first place" (Resp. Br. 25). That claim is inconsistent with the Court's opinion in *Adamson*. The defendant in that case had been convicted of second-degree murder and sentenced to prison (slip op. 2), and in analyzing his double jeopardy claim this Court assumed that in the absence of the plea agreement the Fifth Amendment "would have precluded prosecution of respondent for the greater charge on which he now stands convicted" (slip op. 6). Thus in *Adamson*, just as much as in this case (as respondents view it), the charge was one that the government would have had no "right" to bring in the absence of the plea agreement, but the plea agreement nonetheless sufficed to give the government that right.

4. Respondents also claim (Resp. Br. 6, 22-26) that they should not be held to their plea agreement because their motion to vacate sentence notified the government that they did not intend to be bound by the plea agreement, and that, in any event, they received no real benefits under that agreement. Respondents' claim that after they filed their motion "[t]he government could have then filed any charges they felt they could support in Kansas, Oklahoma or any other state" (*id.* at 6) is specious. Respondents waited more than a year after pleading guilty to file their motion to vacate. Since evidence inevitably becomes stale or lost after guilty pleas have been accepted, the government cannot be expected to prosecute charges that were either never filed or dismissed in reliance on a plea agreement. The Double Jeopardy Clause should not reward a defendant for not asserting a defense that could have been raised before pleading guilty. Cf. *United States* v. *Griffin*, 765 F.2d 677, 681-682 (7th Cir. 1985).



Moreover, before filing the motion to vacate, respondent Ray C. Broce had already testified under immunity before an Oklahoma grand jury and at the Oklahoma bid-rigging trial in *United States* v. *Metropolitan Enterprises*, 728 F.2d 444 (10th Cir. 1984).[6] Thus, as a practical matter, bringing an Oklahoma prosecution against Broce would have been quite difficult, since the government would have had to demonstrate that its evidence did not flow from the immunized testimony. *Kastigar* v. *United States*, 406 U.S. 441, 460-462 (1972).

Similarly, respondents incorrectly claim (Resp. Br. 24-25) that they did not benefit from the plea agreement. In fact, respondents received substantial benefits from the plea agreement, including the government's promise not to prosecute them further in either Kansas or Oklahoma. Although respondents rely on the *Beachner* case to argue that "no additional [Kansas] prosecutions were possible even absent a plea agreement" (*id.* at 25), that case was decided long after respondents entered their guilty pleas pursuant to the negotiated plea bargain in this case. When respondents signed the plea agreement, they obviously preferred the certainty of a maximum of two convictions rather than the risk of conviction and punishment on multiple bid-rigging charges. As this Court has explained, "[a] defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case" (*Brady*, 397 U.S. at 757). Although a defendant "might have pleaded differently had later decided cases then been the law, he is bound by his plea" (*McMann*, 397 U.S. at 774).

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[6] Broce testified before the Oklahoma grand jury in July 1982 and at the trial in September 1982. See *Metropolitan Enterprises*, 728 F.2d at 446-447. The motion to vacate was filed on February 22, 1983 (see J.A. 15, 24).

Respondents' claim that any potential indictments in Oklahoma "would be purely speculative" (Resp. Br. 25) is immaterial and, in any event, wrong. What matters is that respondents bargained for and received government concessions in return for the guilty pleas that they now seek to repudiate, not that some of those concessions related to charges that were under consideration as opposed to charges that had already been brought.[7] And respondents' extensive bid-rigging activity in Oklahoma is well documented in *United States* v. *Washita Constr. Co.*, 789 F.2d 809, 813-816 (10th Cir. 1986), and *United States* v. *Metropolitan Enterprises*, 728 F.2d at 447-448. In the absence of the plea agreement, the government would have had the option of prosecuting respondents in Oklahoma rather than granting immunity to Mr. Broce, a realistic option that, in light of the evidence of respondents' bid-rigging activities, cannot fairly be termed "speculative." Thus, respondents benefited significantly from the plea agreement and should be held to the terms of the bargain.

[7] Thus, we do not "ask[] that respondents be presumed guilty of anti-trust violations in Oklahoma" (Resp. Br. 3), nor do we "argue * * * that the second conviction in the State of Kansas was in reality a conviction for the defendants' activities in the State of Oklahoma" (*id.* at 12-13). We merely assert that it would be inequitable to relieve respondents from their guilty pleas to two facially valid Kansas conspiracy charges when those pleas were the explicit inducement for the government not to pursue further any possibility of charging respondents with Oklahoma offenses, however such charges might have turned out.



For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
*Solicitor General*

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